Calendar No. 746

97TH CONGRESS
2d Session

SENATE

REPORT
No. 97-518

CABLE TELECOMMUNICATIONS ACT OF 1982

REPORT

together with

ADDITIONAL VIEWS

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 2172

TO AMEND THE COMMUNICATIONS ACT OF 1934

AUGUST 10 (legislative day, JULY 12), 1982.—Ordered to be printed

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CABLE TELECOMMUNICATIONS ACT OF 1982

AUGUST 10 (legislative day, JULY 12), 1982.—Ordered to be printed

Mr. PACKWOOD, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 2172]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2172) to amend the Communications Act of 1934, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill do pass.

PURPOSE OF BILL

S. 2172, as reported, provides as follows:

1. The Federal Communications Commission (FCC) shall have jurisdiction over cable in accordance with the provisions of this act and other applicable laws;

2. States, subdivisions, etc., are granted the authority to award a cable franchise;

3. There can be no Federal, State or local regulation or restriction of ownership by any person by reason of that person's ownership of any other media interests;

4. The FCC has authority to prohibit foreign ownership of cable if no reciprocal rights are granted to U.S. companies; current foreign-owned cable systems are grandfathered for the life of the franchise, and for any renewal;

5. Municipal ownership is allowed; municipal acquisition is permitted but only at fair market value and if there is no control over the content of any programing;

6. The FCC will continue to have jurisdiction over whether telephone companies may provide cable service in their own operating areas; the FCC's current cross-ownership ban is not affected;

7. Cable systems with 20 or more channels must set aside, from available channels, 10 percent for use by public, educational, and governmental programers, and 10 percent for use by other channel programers;

8. The franchisor may establish rules for the use of the public, educational, and governmental channels, and the cable operator may establish rules for the use of the other channels;

9. Any access provision in a franchise agreement in existence on March 4, 1982, which exceeds the 10 percent set aside for public, educational, and governmental programers, and/or the 10 percent set aside for other programers, is grandfathered for the life of the franchise agreement;

10. Each State, subdivision, etc., may regulate the rates charged by cable operators for the use of channels for basic service, or charged to subscribers for those basic services;

11. No entity (Federal, State, or local) shall have authority to regulate or restrict the provision of or nature of cable services offered over a cable system;

12. No entity (Federal, State, or local) shall have authority to regulate or restrict the provision of or nature of telecommunications facilities offered by or telecommunications services offered over a cable system, except for the provision of basic telephone service;

13. The FCC shall establish a reasonable franchise fee ceiling paid by cable operators to permit only the recovery of the reasonable cost of regulation of the cable system;

14. The franchisor shall grant to renewal or extension to the cable operator if it finds that the operator has substantially complied with the material terms of the franchise and with other laws, there has been no material change in the legal, technical, or financial qualifications of the operator which would impair service, and the services and facilities to be provided are reasonable;

15. States, subdivisions, etc., are given specific authority to accept competing applications for cable franchises and to award multiple cable franchises;

16. No one may intercept or receive broadband telecommunications unless authorized to do so;

17. The cable system cannot be used to collect personally identifiable information about a subscriber, and no cable operator shall disclose personally identifiable information about a subscriber without prior written subscriber consent or court order;

18. Channel programers remain subject to criminal and civil liability for libel, slander, etc., but cable operators are not liable for programs carried on any of the access channels, or for programs originated by unaffiliated programers;

19. The Federal Government shall have exclusive jurisdiction over cable regarding matters covered by this act;

20. Any State or local law in effect on the effective date of this act which is in conflict with any matters over which the Federal

Government has exclusive jurisdiction is superseded, null and void, and of no effect;

21. The FCC shall encourage new and additional services and such services will be presumed to be in the public interest if they are technically feasible; and

22. The parties to a franchise agreement have 60 days from the date of enactment to bring the agreement into compliance with this act.

Background and Need

INTRODUCTION

This report will explain in great detail the legal and economic rationale for this legislation, S 2172. But before describing the current status of the cable industry and its role in our national communications system, and its position in the marketplace for telecommunications services, the Committee believes that it is important to describe the components of a cable system.

Because over-the-air TV broadcast signals tend to travel in straight paths, their signals diminish with increasing distance. As a result, they lose clarity when encountering immovable obstacles like mountains or tall buildings. A cable system distributes electromagnetic signals to subscribers' television sets via a cable or, more recently, by an optical fiber. These signals reach the viewer with the same clarity as seen at the point of origin.

Cable systems receive programing either from antennae constructed on high ground that pick up signals off-the-air, or from microwave, or from satellite relays. The signals are then transmitted to a "head-end" site, where electronic equipment processes the signals for cable transmission into homes. The network of cable (or optical fiber) that carries the programing into the homes is either attached to utility poles or placed in underground conduits. Amplifiers placed along the cable line ensure the quality of the signal. Therefore, cable provides interference-free service.

In the home, the cable is attached to the back of an ordinary television set. A converter can expand the channel capacity of any such set to well over 100 channels. This completes the description of how cable functions. If a cable subscriber obtains two-way service, a keyboard is also included.

Since adoption of the Commission's comprehensive cable regulatory program in 1972, the cable industry has grown dramatically. Today, there are more than 4,700 systems serving almost 24 million subscribers, and industry revenue totaled $2.3 billion in 1980. The number of cable subscribers is growing at a rate of more than 250,000 per month, and it is estimated that by 1990, half of all American homes will be wired for cable. Not only has the industry increased in size, it also has evolved into much more than just a delivery service for the retransmission of local broadcast signals and the importation of distant broadcast signals. Systems being built in major markets today have the capacity for as many as 100 channels incorporating local and distant signals, multiple tiers of pay programing, locally originated information and entertainment, text services, C–SPAN's trans-

mission of the proceedings of the House of Representatives and Senate committee proceedings, 24-hour news channels, health programing, religious programing for children and other special audiences, alert and alarm services, and networks specializing in sports events. In fact, the Commission's efforts to update its rules, as well as congressional efforts to address problems arising from the development of this new medium, barely have kept pace with technological innovation and consumer interest.

The Commission's recent actions deregulating the cable industry, coupled with significant court decisions eliminating many restrictive regulations adopted in the early 1970's, attest to cable evolution. Rules once imposed to guide cable in its early stages of development no longer are necessary due to demonstrated expertise by the industry, increased understanding about, and familiarity with, the industry by State and local officials and consumers.

In addition, advances in the delivery of video services in general have led to a more competitive environment for cable systems. With the development of multipoint distribution services, subscription television stations, videodiscs and cassettes, master antenna television and satellite master antenna television systems, low power television stations, and direct satellite-to-home broadcast systems, the role of cable in our national telecommunications system has changed. As a result, the need to regulate cable as was originally proposed by the Commission in 1972 is seriously in doubt.

In our effort to encourage fair competition, to insure maximum service offerings, and to achieve parity of treatment among the providers of comparable telecommunications service, the Committee believes that marketplace forces, rather than Government regulation, should prevail. Unnecessary or excessive regulation can impede the interstate development of cable services to the ultimate detriment of all American consumers.

REGULATORY HISTORY

Local Regulation

The first commercial community antenna television system (CATV) in the United States was started in 1948 in Mahanoy City, Pa.[1] Since that town is surrounded by mountains, direct reception of television signals was difficult or impossible. To remedy that problem, an elementary cable system was constructed by placing a receiving antenna on top of a nearby mountaintop and running a cable distribution system from the antenna down to the subscribers' homes in Mahanoy City. This initial cable system was typical of virtually all early cable systems in its provision of television signals in areas where normal reception of those signals was difficult or impossible.

These first cable operations were small local ventures, often owned by community groups or by television repair shop owners. Their pri-

[1] See Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce, "Cable Television: Promise Versus Regulatory Performance," 94th Congress 2d session 9 (1976). Other documents indicate that the first noncommercial system originated in Astoria, Oreg. in 1949, and the first commercial system in 1950 in Lansford, Pa. Subcommittee on Communications of the House Committee on Interstate and Foreign Commerce, "Regulation of Community Antenna Systems," H. Rept. 1635, 89th Congress 2d session 5 (1966).

mary role of providing improved television reception required little or no regulation.

As cable developed through its early years, municipal involvement was generally limited to authorizing use of local streets and rights of way and adopting regulations to protect the safety of life and property. The franchises which authorized their operations were simple documents which reflected basic services provided by the systems.

These franchises (often simply called a "license") would be granted merely upon a company's application therefore. The document would authorize the cable system to use local streets, rights of way, easements, etc., for erecting poles and stringing the wires, cables and conduits necessary for its operations. These franchises often contained provisions regulating the manner in which the streets would be used, establishing construction standards, and dealing with matters such as the repair of sidewalks and streets after construction. These early franchises usually had lengthy terms, often 30 years, and might or might not impose a modest fee for the use of the rights of way.

As technology expanded and cable systems became capable of offering more services, local municipalities interest in, and thus their regulation of, cable began to increase. The FCC's 1972 Cable Television Report and Order [2] opened the cities to cable. As a result, local municipalities began to adopt more extensive franchises.

These cable franchises dealt with matters such as service requirements and rate regulation. In addition, many franchises sought to regulate matters which were clearly of Federal rather than local concern, and this prompted specific FCC decisions to preempt such provisions. For example, the FCC held that regulation of broadcast signal carriage,[3] certain technical standards [4] and regulation of any aspect of pay cable service,[5] were all matters appropriate for comprehensive and uniform Federal regulation.[6]

Unlike previous licenses which were based upon the police power, many modern cable franchises touch virtually every aspect of a cable system's operation.

The premise for the exercise of this expanded local jurisdiction over cable systems continues to be its use of local streets and rights of way. In the past, local regulation bore a reasonable relationship to that use. With the introduction of cable into larger markets and the expansion of services provided over cable, the degree and detail of local regulation has increased and there is no longer a reasonable relationship between local regulation and cable systems' use of streets and rights of way.

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[2] Cable Television Report and Order, 36 F.C.C. 2d 143 (1972), reconsidered, 36 F.C.C. 2d 326 (1972).

[3] Clarification of Cable Television Report and Order, 46 F.C.C. 2d 175, 178 (1974); Champaign-Urbana Communications, Inc., 52 F.C.C. 2d 425, 431 (1975).

[4] Report and Order, Docket No. 20018, 49 F.C.C. 2d 470 (1974).

[5] First Report and Order, Docket No. 19554, 52 F.C.C. 2d 1, 68 (1975); Anthena Cablevision of Corpus Christi, Inc., 59 F.C.C. 2d 1035 (1976); Oceanic Cablevision, Inc., 68 F.C.C. 2d 1426, 1429 (1978); People's Cable Company, 60 F.C.C. 2d 905, 907 (1976). Federal preemption of pay cable matters has also been judicially approved, *Brookhaven Cable TV, Inc.* v. *Kelly*, 573 F.2d 765 (2d Cir. 1978), cert. denied, 99 S. Ct. 1991 (1979).

[6] The FCC also preempted local regulations which exceeded the requirements of its former access rules. See, .e.g., Comcast Cable of Paducah, Inc., 59 F.C.C. 2d 1075 (1975); Arlington Telecommunications Corp., d/b/a ARTEC, 53 F.C.C. 2d 757 (1975).

S. 2172 seeks to restore the jurisdictional boundaries over cable to their more traditional positions. As was pointed out by the FCC:

> The ultimate dividing line, as we see it, rests on the distinction between the use of the streets and rights-of-way and the regulation of the operational aspects of cable communications. The former is clearly within the jurisdiction of the States and their political subdivisions. The latter, to the degree exercised, is within the jurisdiction of the Commission—Report and Order, Docket No. 20772, 54 F.C.C. 2d 855, 861 (1975).

State Regulation

Although the franchising process is principally controlled by local municipalities, at the present time the States are free to impose or superimpose their own regulatory scheme. The State of New York, for example, has a State cable commission which has as many employees as the FCC Cable Bureau. While the Federal Government, through the FCC, has been reducing regulation of the cable industry, there has been an increase in the involvement of State government in this industry.

According to information compiled by the FCC,[7] some States have established independent commissions on cable, while others regulate through State public utility or public service commissions. But other States have enacted specific statutes granted franchising authority to counties or local municipalities.

While new State regulatory statutes have been enacted, it is also true that other States, for example, California and Massachusetts, have taken statutory action to deregulate cable.

It is not in the public interest for the States to replace the regulation that has been consciously abandoned at the Federal level with their own regulatory scheme. Federal deregulation is not intended to allow assertion of regulation by another branch of Government, it is intended to allow cable to compete in the marketplace with other providers of comparable telecommunications services. For that reason, a definitive jurisdictional framework is essential.

Federal Regulation

As was indicated previously, cable began as a way to provide improved television reception in areas where off-the-air reception of those signals was difficult or even impossible. And, in its early history, cable was subject to a minimum of regulation by local municipalities. Federal regulation was asserted only after broadcasters came to the FCC with the argument that they were being subjected to unfair competition from cable operators.

In 1948, the FCC announced that it would not act on any new or pending applications for the construction of television stations until it adopted a national allocation plan. This freeze was lifted in 1952.

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[7] Briley, "Cable Television State Regulation—A Survey of Franchising and Other State Law and Regulations" (FCC 1977, 1980). These surveys are compiled periodically by the Cable Television Bureau, Policy Review and Development Division.

Sixth Report and Order on Television Allocations, 41 F.C.C. 148 (1952).

After the freeze was lifted, there was an increase in the number of television stations. So too was there an increase in the number of cable systems. This was when broadcasters began to be concerned about the competitive threat presented by cable.

In 1956, a group of television licensees alleged that cable operations would have an adverse economic impact on broadcasting, and thus asked the FCC to assert jurisdiction over cable under title II, the common carrier provisions of the Communications Act of 1934.[8] The FCC declined to do so, and held that cable systems could not be considered common carriers under the statutory scheme of the 1934 Act.

As technology improved and demand increased for additional television signals, cable systems began to "import" television signals from distant markets using common carrier microwave facilities. The common carriers had to obtain FCC approval before they could provide cable systems with this service.

In a very significant decision, *Carter Mountain Transmission Corp.*,[9] the FCC denied an application for such authority. It found that the proposed carriage by the cable system of distant signals, which duplicated much of the programing on the local TV stations, would cause economic injury to the stations. The FCC did say, however, that carriage of the distant signals would be authorized if the local station were carried as well, and if the duplicated programing were deleted of blacked out.

Three years later, the FCC asserted direct jurisdiction over microwave-fed cable systems.[10] The rules that the FCC adopted required microwave-fed cable systems to carry all local television stations upon request, and to prevent duplicating the programs carried by local stations, either simultaneously or within 15 days of when they were aired.

It was only 1 year later when the Commission assumed jurisdiction over all cable systems.[11] The rules it adopted required mandatory signal carriage and kept the program exclusivity provisions (now only same day protection). The rules also required cable systems within the nation's 100 largest television markets which proposed to import distant television stations to first establish, in a hearing, that such importation would not harm local broadcasters.

These hearings, however, turned out to be totally unworkable, and the effect was to prevent cable service from being introduced into the country's largest cities. As a result, the FCC halted these hearings while it looked for possible alternatives for distant signal regulations.[12]

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[8] 47 U.S.C. Sections 151 et seq. The Communications Act of 1934 does not contain any provisions authorizing Federal regulation of cable. The Supreme Court has approved FCC regulation of cable under the Act when it is "reasonably ancillary" to its authority over broadcasting. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972).

[9] *Carter Mountain Transmission Corp.* 32 F.C.C. 459 (1962) aff'd, *Carter Mountain Transmission Corp.* v. *FCC*, 321 F. 2d 359 (D.C. Cir. 1963), cert denied, 375 U.S. 951 (1963).

[10] First Report and Order, Dockets Nos. 14895 and 15233, 38 F.C.C. 683 (1965).

[11] Second Report and Order, Dockets Nos. 14895, 15233 and 15971, 2 F.C.C. 2d 725 (1966).

[12] See, e.g., Notice of Proposed Rulemaking and Notice of Inquiry, Docket No. 18397, 15 F.C.C. 2d 417 (1968); Second Further Notice of Proposed Rulemaking, Docket No. 18397-A, 24 F.C.C. 2d 580 (1970).

In 1972, these proceedings culminated in the issuance by the FCC of the Cable Television Report and Order (1972 Report).[13] In the 1972 Report, the Commission adopted rules regulating television broadcast signal carriage by all cable systems; requiring the deletion of network and syndicated programing of distant television stations; and requiring cable systems located within the 100 largest television markets to have a minimum of 20 channels, two-way capability and four dedicated access channels for public, educational, local government and leased access purposes. Systems having more than 3,500 subscribers were required to originate locally produced programing (cablecasting). The 1972 Report also adopted rules concerning technical standards and the division of Federal, State and local regulatory authority. Finally, it instituted certification procedures for cable systems.

The FCC established in the 1972 Report the basic Federal regulatory framework for the cable industry, and this framework still exists today. Although a number of those rules have been substantially altered or deleted as a result of judicial decisions, as well as the FCC's own deregulatory efforts.

For example, the Commission has modified or eliminated its rules governing pay cablecasting,[14] local origination cablecasting,[15] local franchise standards,[16] and access channels.[17] Rules governing carriage of television broadcast signals were also liberalized.[18] Finally, in 1980, the Commission issued its Report and Order in Docket Nos. 20988 and 21284,[19] eliminating almost all of its restrictions on the carriage of distant television stations and deleting its rules requiring cable systems to provide syndicated exclusivity protection.

To elaborate on the subject of governmental regulation of cable, in its 1972 Report, the Commission addressed various aspects of rate regulation in subpart C of the rules entitled, "Federal-State/Local Regulatory Relationships."

The Commission stated that it was requiring local authorities to regulate rates for services regularly furnished to all subscribers and for equipment installation, and added that the appropriate regulatory standard would be the maintenance of rates that were fair to the system and to the subscribing public. The Commission said that fairness of rates would turn on the facts of each case and on the accumulated experience of other communities served by cable.

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[13] Cable Television Report and Order, 36 F.C.C. 2d 143 (1972), reconsidered, 36 F.C.C. 2d 326 (1972). In addition to dealing with signal carriage, the 1972 Report also terminated rulemaking proceedings involving technical performance (Notice of Proposed Rulemaking, Docket No. 18894, 25 F.C.C. 2d 38 (1970)); and the division of regulatory responsibility among Federal, state and local governments (Notice of Proposed Rulemaking, Docket No. 18892, 22 F.C.C. 2d (1970)).

[14] Report and Order, Dockets Nos. 19554 and 18893, 67 F.C.C. 2d 252 (1977). This action followed the court's decision in *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9 (D.C. Cir. 1977), cert. denied, 434 U.S. 829.

[15] Report and Order, Docket No. 19988, 49 F.C.C. 2d 1090 (1975).

[16] Report and Order, Docket No. 21002, 79 F.C.C. 2d 390 (1977).

[17] Report and Order, Docket No. 20508, 59 F.C.C. 2d 294 (1976); Order, Docket No. 20508, 45 F.R. 76179 (November 18, 1980). This action followed the Supreme Court's decision in *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979).

[18] See, e.g., Report and Order, Docket No. 19859, 57 F.C.C. 2d 68 (1976); First Report and Order, Docket No. 20553, 58 F.C.C. 2d 442 (1976); recons. denied, 60 F.C.C. 2d 661 (1976); Report and Order, Docket No. 20028, 48 F.C.C. 2d 699 (1974); Memorandum Opinion and Order, 54 F.C.C. 2d 1182 (1975); and Report and Order, Docket No. 20487, 57 F.C.C. 2d 625 (1976).

[19] 79 F.C.C. 2d 663 (1980), aff'd sub nom., *Malrite T.V. of New York* v. *FCC*, 652 F. 2d 1140 (2d Cir. 1981).

The 1972 rules required franchise authorities to specify or approve initial subscriber and installation rates; to institute a program for rate review and, if necessary, rate adjustment; and to give reasonable advance notice to the public of proposed rate changes. In addition, rate adjustments were permitted only after a public proceeding affording due process to all parties.

With respect to franchise fees, the 1972 Report took notice of the fact that many local authorities had extracted high fees more for revenue-raising than for regulatory purposes. From such evidence, the Commission concluded that some limits were necessary to insure reasonableness, and to strike a balance between the achievement of regulatory goals and the assurance of adequate revenue to defray the cost of local regulation. In setting a limit, the Commission explained that it also was concerned about other costs imposed, or about to be imposed, on cable systems, such as: (1) those resulting from the ongoing dispute over utility pole attachment rates and the claims of telephone and electric power companies; (2) the Commission's own annual fee of 30 cents per subscriber to help finance its cable regulatory program; (3) new obligations resulting from adoption of the Commission's compresensive rules; and (4) the near-term prospect of congressionally imposed copyright payments. After weighing all of these factors, the Commission concluded that a maximum franchise fee of between 3 and 5 percent of gross subscriber revenues would be adequate to compensate local authorities for their regulatory program. At the same time, it would not interfere with the cable industry's ability to meet the obligation imposed by the FCC's rules, or to participate effectively in the national communications system.

Following the adoption of the 1972 Report, there was still concern about the need for particular regulations, and also about the appropriate regulatory jurisdiction for those regulations. In particular, the cable industry sought elimination of regulations it believed were excessive or duplicative, and expressed frustration about inconsistent and conflicting Federal, State, and local rules. For example, uncertainty was expressed about the force of the Commission's rate regulation requirement in states where local governments did not possess rate regulation authority.

In response to this concern, the Commission initiated a proceeding in 1975 to determine whether it should continue to require local authorities to regulate subscriber and installation rates. In its Notice of Proposed Rulemaking in Docket No. 20681, 57 FCC 2d (1975), the FCC proposed that rate regulation be discretionary, but stated that if a franchisor had appropriate authority, and decided to engage in rate regulation, such authority should be exercised only after adopting procedures insuring public notice and due process.

The FCC issued a Report and Order in Docket No. 20681 in 1976, terminating the proceeding and deleting the rule requiring local authorities to engage in rate regulation (60 FCC 2d 672 (1976)). Explaining its action, the Commission stated that unintended problems had arisen from the rate regulation requirement, and it expressed confidence that most, if not all, subscriber rate problems could be settled effectively through local procedures.

During the pendency of this proceeding, the Commission initiated another proceeding into the procedures for establishing subscriber rates (Notice of Inquiry in Docket No. 20767, adopted April 1, 1976, 58 FCC 2d 915 (1976)). Its purpose was to gather factual information relating to the establishment of cable subscriber rates, the need for and efficacy of the process, associated costs, benefits, and problems, and what role, if any, the Commission should play in the process. To the Committee's knowledge, this proceeding has never been terminated.

In 1977, the Commission issued a Report and Order in Docket No. 21002, in which it announced its decision to delete its franchise standards (66 FCC 2d 380 (1977)). In response to numerous petitions for reconsideration and clarification, the Commission, in 1979, adopted a Memorandum Opinion and Order and Further Notice of Proposed Rulemaking stating that it was not persuaded that its earlier action was incorrect, but that it did believe it necessary to give further consideration to the rule limiting the franchise fee that a local municipality or state could impose as part of the franchise process (71 FCC 2d 569 (1979)). The Commission has received numerous comments on its proposal to eliminate the franchise fee limit, but has not yet issued a final decision.

The Commission's recent actions deregulating the cable industry, coupled with significant court decisions eliminating many restrictive regulations adopted in the early 1970's, attest to cable's evolution. Rules once imposed to guide cable in its early stages of development are no longer necessary due to demonstrated expertise on the part of the industry itself, and to increased understanding about, and familiarity with, the industry on the part of state and local officials, and potential cable subscribers.

In addition, advances in the delivery of video services in general have led to a more competitive environment for cable systems. With the development of competitive programing services, the role of cable in our national telecommunications system has changed, and the need to regulate cable as was originally proposed by the Commission in 1972 is seriously in doubt.

In our effort to encourage fair competition, to insure maximum service offerings, and to achieve parity of treatment among the providers of comparable telecommunications services, the Committee believes that the marketplace forces, rather than Government regulation, should govern and prevail.

This bill restores the jurisdictional framework for cable to its traditional and appropriate balance. That balance continues to give local governments the authority over areas of local concern and authorizes them to protect local needs. At the same time, however, the bill maintains the ability of the FCC to exercise its long-standing jurisdictional authority over cable in a manner which will protect the Federal interest, embodied in this legislation, in a competitive marketplace.

LEGISLATIVE HISTORY

During the 96th Congress, several bills were introduced to amend the Communications Act of 1934 to provide improved telecommunications service and equipment to encourage and develop marketplace

competition, and to deregulate such services and equipment. S. 622, a bill "to amend the Communications Act of 1934 in order to encourage and develop marketplace competition in the provision of certain services and to provide certain deregulation of such services, and for other purposes," was introduced on March 12, 1979, by Senators Goldwater, Schmitt, Pressler, and Stevens. S. 611, a bill "to amend the Communications Act of 1934, as amended, to provide for improved domestic telecommunications development, to establish a national commission on spectrum management, and for other purposes" was introduced on March 12, 1979, by Senators Hollings, Cannon, and Stevens. Hearings were held for both S. 622 and S. 611 on April 24, 25, 26, 27, 30; May 1, 2, 3, 9, 10, 11, 16; June 5, 6, 7, 8, 13, 14, 15, 18, 19, and 25, 1979. The Communications Subcommittee heard testimony from 171 witnesses. S. 622 contained several provisions similar to those in S. 2172.

In the second session of the 96th Congress, on June 12, 1980, Senators Hollings, Cannon, Packwood, Goldwater, and Schmitt introduced S. 2827 to "amend the Communications Act of 1934, to provide for improved domestic and international telecommunications, rural telecommunications development, and for other purposes." No hearings were held on S. 2827. That bill also contained provisions relating to cable.

S. 898, the Telecommunications Competition and Deregulation Act of 1981, a bill "to amend the Communications Act of 1934 to provide for improved domestic telecommunications, and for other purposes," was introduced during the first session of the 97th Congress on April 7, 1981, by Senators Packwood, Goldwater, Schmitt, and Stevens. The full Commerce Committee held hearings on June 2, 11, 15, 16, 19, and 22, 1981, and heard testimony from 66 witnesses.

The Committee on Commerce, Science, and Transportation met in open executive session on July 16, 1981, to consider S. 898 and ordered the bill reported with amendments by a vote of 16 to 1. Several of the amendments related to cable.

During Senate debate on S. 898, Senators Packwood and Cannon proposed an amendment to the cable provisions in the bill. The Packwood-Cannon amendment passed by a vote of 52 to 40, with one voting present. Senator Goldwater then introduced an amendment to delete all of the cable provisions in S. 898 with the exception of section 237 (the telephone company-cable crossownership section). This amendment passed by a vote of 59 to 34, with one voting present. Senator Boschwitz introduced an amendment to strike the final cable provision, section 237, mentioned above. That amendment was defeated by a vote of 54 to 38, with one voting present.

Since that time, the Commerce Committee held 2 days of field hearings on cable. The first was in Seattle, Wash., on January 18, 1982, chaired by Senator Packwood, and attended by Senator Gorton. The Committee heard testimony from 10 witnesses. The second hearing was in Albuquerque, N. Mex., on February 16, 1982, and was chaired by Senator Schmitt. The Committee heard from 10 witnesses as well. In addition, statements were received for the record from 18 other parties.

Based upon this evidence, and many months of study of the issues, on March 4, 1982, Senator Goldwater introduced S. 2172, the Cable

Telecommunications Act of 1982. Senator Kasten was an original cosponsor, and since then, Senators Schmitt, Kassebaum, and Stevens have been added as cosponsors.

The Subcommittee on Communications held 3 days of hearings on April 26, 27, and 28, 1982, on this bill, heard testimony from 54 witnesses, and received statements from scores of others. After the hearings, the staff evaluated all of the testimony and comments received by the subcommittee. Amendments to S. 2172 proposed by the staff were widely circulated on July 2, 1982.

The Committee on Commerce, Science, and Transportation met in open executive session on July 22, 1982, to consider S. 2172 and ordered the bill reported with amendments by a vote of 13 to 3.

Summary of Bill

FINDINGS

Section 601 details the findings of the Congress that cable is engaged in interstate commerce; that the provision of cable is of concern to all governmental entities, Federal, State, and local; and that a uniform national policy for cable is needed to eliminate and prevent conflicting regulations so that cable will develop as a competitive medium and will serve the needs and interests of the public. The Committee feels that cable is of concern to all levels of Government, and that jurisdiction should be apportioned according to the other provisions in the bill.

PURPOSES

Section 602 contains the purposes of this proposed legislation which are to establish a national policy for, and to encourage a competitive environment for cable; to establish guidelines for the exercise of Federal, State, and local regulatory authority; and to allow cable to compete in the marketplace. The Committee specifically recognizes that all levels of Government have a role to play with guidelines established by the act. Also, the Committee believes that free and open marketplace competition in the provision of cable can only develop if the cable industry is free of unnecessary and burdensome restrictions which place cable at a competitive disadvantage with other providers of similar services.

DEFINITIONS

Section 603 contains the definitions of the terms used in proposed Title VI, and while most are self-explanatory, the Committee believes that some need further explanation.

"Basic service" is defined as retransmitted broadcast signals and public, educational, and governmental programing. There is no distinction made as to whether the retransmitted broadcast signals are local or distant; both kinds would be included. Thus, so-called superstations such as WTBS in Atlanta, Ga., would be part of basic service.

The Committee has defined basic service only in terms of what service may be regulated by local authorities. Under section 607(a), States, subdivisions, etc., are given authority to regulate the rates for basic service, as defined by this section. The Committee wishes to make clear

its intention not to force franchising authorities and cable operators to tier or re-tier their programing offerings. Such decisions are properly made as part of the franchising, or refranchising process, and the Committee does not intend to interfere with those decisions. The term basic service is defined simply to indicate the scope of the franchisor's authority over rate regulation.

"Basic telephone service" is defined to include service provided through a switched network capable of providing two-way voice grade communications. Basic telephone service refers only to local, or intra-exchange, voice telephone service which the public normally receives under a tariff from a telephone company.

"Cable service" is defined as one-way programing on a per-channel, per-program, or other basis, but it does not include basic service. The Committee intends this term to include all one-way programing services, whether available free, or on a pay basis, to the subscriber. Thus, such offerings as ESPN, BET, HBO, Showtime, the Movie Channel, Escapade, Bravo, CNN, etc., would all be considered cable services.

The term does not include basic service since this definition relates directly to the rate regulation provisions in section 607, and the Committee intends to separately define what services may or may not be regulated.

A "cable system" is defined in the bill as a primary control center used to receive and retransmit, or to originate broadband telecommunications service over coaxial cable or cables to a subscriber. There are four exemptions that are specifically not to be considered as a cable system for purposes of proposed Title VI.

The first exemption is for a facility that only retransmits television signals of television stations.

The second exemption is for a facility or combination of facilities that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management. These are the so-called private cable systems, or master antenna television (MATV) or satellite master antenna television (SMATV) systems.

The private cable system utilizes the same technology and satellite reception capabilities as the larger municipally franchised cable system. MATV delivers its signals via microwave, while SMATV delivers its signals via satellite transmission. However, the private cable system serves only residential apartment, cooperative, condominium, and any other multiple unit dwelling complexes. Hence, under existing law, the private cable system is not subject to State and local regulation, since it does not use the public rights of way.

Private cable systems are recognized as a part of the broadband telecommunications network in this country under existing FCC policy. It is the intention of this legislation to further define FCC policy. Therefore, private cable systems, like the smaller cable systems also specifically exempted, continue to remain subject to the exclusive jurisdiction of the FCC.

The third exemption is for a system serving fewer than 2,000 subscribers. The Committee intends by this exemption to relieve these smaller systems of the regulatory impositions under Title VI, e.g., access requirements, but does not intend to remove such systems from under the exclusive jurisdiction of the Federal government. Therefore,

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States and local governments would not be able to regulate these smaller systems as long as the FCC is given exclusive jurisdiction over broadband telecommunications.

The final exemption is for common carriers subject to the provisions of Title II of the Communication Act, whenever any carrier transmits broadband telecommunications services.

"Telecommunications" refers to transmission of information by electromagnetic means. This includes all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of information) essential to such transmission.

"Telecommunications service" does not include basic service or cable service since this definition relates directly to the rate regulation provisions in section 607, and the Committee intends to separately define what services may or may not be regulated.

STATEMENT OF AUTHORITY

Section 604 provides that the FCC shall have jurisdiction over broadband telecommunications in accordance with this act and with other laws. The Committee intends that the FCC retain its current and traditional jurisdiction as well as assume the new grants of jurisdiction under the act. The Committee wants to make clear, however, that this grant of jurisdictional authority is not to be construed as an affirmative grant of regulatory power to be exercised by the FCC. On the contrary, the Committee expects that the FCC will exercise even less regulatory power over cable systems than it presently does.

Also in section 604 is a statutory grant of authority to states, subdivisions, etc., to award a cable franchise. This is the first instance of the Congress recognizing the right of a State or local governmental entity to award a cable franchise to serve its jurisdiction. Although this provision has no effect on the antitrust laws, the Committee wishes to make it clear that franchising authorities have a legitimate role in the provision of cable telecommunications to the public.

OWNERSHIP OR CONTROL OF CABLE SYSTEMS

Section 605 provides that no entity, Federal, State, or local, shall have the authority to prohibit the ownership of cable systems by any person by reason of that person's ownership of any other media interests. Those media interests include broadcast (radio or television), cable, newspaper, programing service, or other printed or electronic information service. The intent of the Committee is to eliminate all current FCC restrictions on cable cross-ownership (broadcast, translator, network, newspaper, etc.), and to prevent any future Federal, State, or local cross-ownership or multiple ownership restrictions. The Committee believes in free and open competition in the marketplace and in the elimination of and prevention of artificial barriers to entry by any person.

These provisions reflect the competitive nature of the cable industry and the entertainment industry. During the hearings on S. 2172 before the Communications Subcommittee, numerous witnesses described the increasing competition within the cable industry, demonstrating a

lack of concentrated power in any single company, or even a group of companies.

In addition, the cable industry faces strong and increasing competition in the provision of services from a variety of other sources. These sources include subscription television (STV), multi-point distribution service (MDS), over-the-air broadcasting (radio and TV), satellite master antenna television systems (SMATV), microwave master antenna television systems (MATV), video cassettes and discs, movie theatres. and proposed services including low power television (LPTV), direct broadcast satellites (DBS), and multi-channel MDS. Detailed studies submitted during the hearings on S. 2172 support the conclusion that the video market is indeed competitive. Browne, Bortz, and Coddington, "The Impact of Competitive Distribution Technologies on Cable Television"; Shooshan and Jackson, "Cable Television: The Monopoly Myth and Competitive Reality"; Federal Communications Commission Office of Plans and Policy, Staff Report on Policies for Regulation of Direct Broadcast Satellites (1980); Federal Communications Commission, Office of Plans and Policy, Staff Report on FCC Policy on Cable Ownership (1981); Comments of the Department of Justice in General Docket No. 80–603, Direct Broadcast Satellites (1981).

The Committee firmly believes that it is therefore unnecessary and counterproductive for any governmental authority to erect artificial barriers to entry by any person. There is no need, for example, to place a limit on the number of cable systems a single company can own, nor to limit cable ownership by reason of broadcast, network, newspaper, program service, or other media ownership.

The Committee intends that any proceedings or pending orders which may be ongoing as of the date of enactment, and which are based upon any law, regulation or policy concerning cable ownership which is in conflict with the provisions of this bill shall be terminated without prejudice to the person against whom the proceeding was originally instituted.

There is one important exception to the provision of this section, and that is concerning telephone company-cable cross-ownership. Section 605 only prohibits regulation of cable ownership based on ownership of other "media" interests. Telephone company ownership is not included in that term. Thus, section 605 does not in any way affect the authority of the FCC over telephone company-cable cross-ownership.

Section 605 also gives the FCC the authority to establish rules and regulations to prohibit foreign ownership of cable if no reciprocal rights are granted by that foreign country to U.S. companies to provide cable therein. The Committee hopes that this provision will ensure that U.S. cable enterprises are treated fairly and equally in their ability to provide cable in foreign countries. Section 605 does contain a provision which grandfathers any current foreign-owned cable system, or any pending proposal by a foreign-owned company, for the life of the franchise, and for any renewal or extension of such franchise. The Committee recognizes the need to preserve service to the public to which they have become accustomed, and to not prejudice the legitimate business expectations of foreign-owned companies.

Finally, section 605 provides that the prohibition of regulation of ownership of cable systems by any person is intended to apply to the ability of a State or municipality to acquire or own a cable system. A State or municipality is free to do so.

There are, however, two qualifications to municipal acquisition of ownership. First, in any case in which a State, subdivision, etc., acquires an ownership interest in any cable system, such interest must be acquired at not less than fair market value. According to generally accepted economic principles, fair market value includes good will and the value of the cable system as an ongoing business. The purpose of this requirement is to preclude the inequitable acquisition of the property and business of a cable operator by a state, subdivision, etc., either prior to, or at the end of, the franchise term, at a price far below the value of the system.

Second, in any case in which a State, subdivision, etc., has or acquires any ownership interest, it is prohibited from owning or controlling, directly or indirectly, the content of any of the programing provided on such cable system except with respect to public, educational, or governmental access channels as provided in section 606(b)(1). The Committee believes that Government control of the content of the programing on a government-owned cable system is patently inconsistent with first amendment principles. No government, Federal, State, or local, should have the power or the ability to control news and information disseminated over any electronic medium.

ACCESS CHANNELS

Section 606 provides that cable systems with 20 or more channels shall dedicate or set aside for access, from available channels, 10 percent for use by public, educational, and governmental programers, and 10 percent for use by other programers. The term "available" means actually and technically available and not subject to other use requirements, like the FCC's current must-carry rules. The threshhold question is channel capacity, i.e., the access requirement applies to all systems with 20 or more channels. Then operators would deduct from their total any channels subject to other use requirements—must-carries and any channels technically unavailable. From that net, the two 10 percent set asides would be computed. Any fractions would be rounded to the closest whole number (8.8=9; 8.4=8).

The access channels are not available for use by the cable operator or any of his affiliates. The franchisor is given complete control over the public, educational, and governmental channels, and the cable operator is given complete control over the other access channels. In addition, until there is demand for each channel full time, access channel programing may be combined by the cable operator on one or more channels, and if time is available, the operator may use the channels for other services. The Committee recognizes that there are instances today when access channels are not in use, and yet, the operator must leave those channels blank. With this provision, the subscriber will benefit from the widest possible selection of programing on an uninterrupted basis.

Section 606 also provides that the obligation to provide access channels shall cease when the FCC determines that there are reasonably available alternatives for persons desiring to provide programing service to the public in a particular geographic area or market. In determining whether there are reasonably available alternatives, the FCC is directed to consider the number and size of other providers of programing service, the extent to which programing service is available from other providers, the ability of such other providers to make programing service readily available at comparable rates, terms, and conditions, and other indicators of the extent of competition.

In making its determination, the FCC is to ta ke into account the presence of commercial and noncommercial radio and television broadcast stations (radio and TV), subscription television stations (STV), low power television stations (LPTV), multipoint distribution services (MDS), master antenna television systems (MATV), satellite master antenna television systems (SMATV), direct broadcast satellite services (DBS), movie screens, videocassettes and videodiscs, and any other programing services which may become available in the future.

Section 606(g) specifically provides that a cable operator may make available, in his sole discretion, additional channels to public, educational, governmental, and other programers. The Committee has established in S. 2172 a Federal and uniform standard for access, which is both a minimum and a maximum—the two 10 percent set asides are absolute levels which must be adhered to by all cable operators, with one exception for grandfathering which will be discussed below. Thus, section 606 would prevent any governmental or other franchising authority from requiring, or even asking for during the franchise process, greater access channel set asides than provided for in this bill. However, the Committee recognizes the inherent problems in trying to legislate the amount of programing that anyone may receive, and it believes that some flexibility is needed. Therefore, section 606(g) would allow for public, educational, governmental, and other programers to negotiate with the cable operator in the marketplace for channel usage in excess of the two 10 percent set asides. This section reflects a recognition by the Committee that programers should be able to engage in the same kind of arms-length negotiations with cable operators that occur in the private sector for the supply of other goods and services to the public.

Finally, section 606(h) provides that any franchise agreement in existence prior to March 4, 1982, the date S. 2172 was introduced in the Senate, that includes greater access than required in this bill, would be grandfathered at that level for the life of the franchise. At the end of that franchise term, the access requirements in the franchise agreement would have to come into compliance with the Federal standard. The Committee believes that it is important to preserve the status quo in existing franchise agreements to the maximum extent possible, and this provision will enable consumers to continue to receive programing to which they have become accustomed.

The Committee reluctantly, and with some misgivings, has provided for this scheme of mandatory access on the theory that cable today is unique in its ability to provide an outlet for diverse sources

of programing to the community. Therefore, cable has a special obligation to provide the capability for these diverse sources to reach the public. When new and competitive alternatives for programing services become available, this special obligation should and will cease.

REGULATION OF RATES AND SERVICES

Section 607 provides that States, subdivisions, etc., are authorized to regulate the rates charged by cable operators for the use of channels for basic service, and charged to subscribers by operators for basic service. It is the intent of this Committee that a cable operator would be free to offer, and in fact a franchising authority could request, other programing services as part of his "basic service" package. However, if additional programing is included in "basic service," as defined in the franchise agreement and not as defined by this act, the franchising authority would only be permitted to regulate the portion of the rate charged which is attributable to the retransmitted broadcast signals and the public, educational, and governmental programing.

Section 607 also provides that no entity, Federal, State, or local, may regulate or restrict the provision of or nature of cable services offered over a cable system. It is well settled that the FCC presently has jurisdiction over the regulation of pay-per-program services, even though it has declined to exercise its regulatory authority. *Brookhaven Cable TV, Inc.* v. *Kelly*, 573 F. 2d 765 (2nd Cir. 1978). The Committee wishes to make clear that programing services cannot be regulated under S. 2172 without regard to whether the program is paid for by an advertiser or by a subscriber.

Lastly, section 607 provides that no entity, Federal, State, or local, may regulate or restrict the provision of or nature of telecommunications facilities offered by or telecommunications services offered over a cable system, except with respect to the provision of basic telephone service. It is the intent of the Committee that no entity should regulate these facilities or services as to rates, terms, conditions, content, or nature. The development of telecommunications services, which is intended to be as broad a term as possible, and their availability over cable systems is in the early stages of development. Such two-way services as electronic banking, security services, electronic shopping, electronic Yellow Pages, videotex and teletext, data transmissions, and video conferencing, are rapidly becoming available to the American public through a variety of sources. However, only a few cable systems have the technical capability to provide for these interactive services.

The Committee firmly believes in encouraging competition and in not imposing any regulation where marketplace forces are better able to ensure innovation, diversity, and efficiency. Whether or not such telecommunications facilities and services can or will be provided on an unregulated basis in the future over other electromagnetic means, it is the intent of this Committee that these facilities and services, when offered by or over a cable system, shall be free of any governmental regulation or restriction.

An exemption from this total preclusion from regulation is the provision of basic voice telephone service. This exemption is not intended to either create new regulatory authority nor to extend current regula-

tory authority over basic voice telephone service. Since the provision of basic voice telephone service by local telephone companies will, in all likelihood, continue to be regulated, allowing cable systems to provide the same service free of regulation would impose disparate regulatory burdens on telephone companies. It is thus the belief of the Committee that if a cable system is used for the provision of basic voice telephone service, it would be subject to, and not exempt from, regulation applicable to any carrier as required by Federal or State agencies responsible for the regulation of telephone companies.

FRANCHISE FEES

Section 608 provides that the FCC shall establish, within 180 days, a reasonable franchise fee ceiling to be paid to franchising authorities by cable operators to permit only the recovery of the reasonable cost of regulation. This provision merely codifies authority presently exercised by the FCC. Today, the FCC places a ceiling on franchise fees of 3 percent of the operator's gross annual revenues, with a possible waiver of up to 5 percent under appropriate circumstances.

The Committee believes that some localities may be able to justify a higher franchise fee because of greater regulatory costs. In particular, since this bill gives State and local governments increased control over public, educational, and governmental access channels, it is expected that there may be increased costs to administer and regulate these channels. Moreover, the Committee is aware that a number of jurisdictions use a portion of the franchise fee to fund the development of access programing. Such a use would be consistent with, and included in, a reasonable cost of regulation, and would not interfere with the effectuation of Federal goals and policies established pursuant to this title. As a result, the bill does not provide for a cap on the amount of any waiver request as is presently the case. Each waiver request will be judged on its merits according to the demonstrated need.

The Committee feels it necessary to impose such a franchise fee ceiling procedure because the Committee is concerned that, without a check on such fees, local governments may be tempted to solve their fiscal problems by what would amount to a discriminatory tax not levied on cable's competitors. This would clearly place cable operators at a competitive disadvantage and thus be detrimental to the public in the long run.

The authority for the FCC to place a ceiling on franchise fees will permit State or local governments to recover revenues sufficient to cover the cost of cable-related expenses; it will encourage the continued growth of cable by eliminating excessive fee demands; and it will permit the entry of new cable entrepreneurs. Further, the FCC, periodically upon its own motion or upon petition, may review the appropriateness of such ceilings and make adjustments therein.

RENEWALS AND EXTENSIONS

Section 609 establishes a renewal expectancy for cable operators. Under this section, the franchisor shall grant a renewal or other extension if it finds three tests have been met: (1) The operator has sub-

stantially complied with the material terms of the franchise and with applicable law; (2) there has been no material change in the legal, technical, or financial qualifications of the operator that would substantially impair continued service; and (3) the services and facilities to be provided are reasonable, that is, state-of-the-art for communities of that size and type.

The franchisor is given complete control over the application of the renewal tests, compared to the Federal Government's complete control over the renewal of radio and television broadcast station licenses. However, the Committee intends that the same renewal expectancy for broadcasters, which the Congress has recognized in proposed legislation (S. 1629), should apply as well to cable operators. Moreover, this concept of a renewal expectancy for broadcasters was just recently sanctioned by the courts. *Central Florida Enterprises, Inc.* v. *Federal Communications Commission*, No. 81-1795 (D.C. Cir. July 13, 1982).

The Committee's interest is not in protecting the cable operator, but in protecting the consumer/subscriber. The Committee believes that this provision, establishing a legitimate renewal expectancy, will benefit the subscriber by encouraging greater investment by the cable operator in the cable system at the time of the grant of the initial franchise. Moreover, because cost of construction of a cable system today has escalated into the millions of dollars, and because it is now typically between 8 and 10 years into the franchise term before the operator begins to show a profit, this renewal expectancy should enhance the ability of operators to obtain financing for construction of the system. The investment community will thus recognize cable systems are sound long-term investments.

Finally, the renewal expectancy will ensure that the community will be receiving the same quality and type of service that other communities of comparable size and characteristics receive. This section should provide the impetus for those cable operators who have heretofore been reluctant to, or even have refused to, rebuild their systems so they are state-of-the-art for comparable communities. Under this provision, such a refusal would be prima facie grounds for denial of renewal by the franchisor.

Section 609 also provides that cities may entertain competing applications, and it further contains a specific statutory grant of authority to states, subdivisions, etc., to award multiple cable franchises. Under this section, if the franchisor finds that the cable operator has met the three-prong test for renewal, it would have to grant such renewal or extension. However, the franchisor may solicit or entertain competing bids to serve the same franchise area. If the franchisor receives a better offer to provide service than what the current operator is providing, the franchisor would be free to award a second (or as many additional as he chose) franchise and allow the companies to compete head-to-head. The Committee believes that this would result in true marketplace competition, which is the goal of this Committee in all of its deregulatory legislation.

The statutory grant of authority to States, etc., to award multiple franchises is more than an illusory grant. Construction of multiple cable franchises to serve the same geographic area is becoming more and more prevalent. During the hearings on S. 2172, a detailed study of

overbuilding, Paul Kagan Associates, Inc., "Overbuild Competition in Cable TV," was submitted for the record. This study points out that there are nearly 100 overbuilds in existence today, and that there has been a steady increase in overbuilding in the past three years.

This trend is a direct result of changing economic and technological circumstances. Cable today is a national telecommunications medium, reaching approximately 30 percent of all American homes. In the past 3 years, there have been almost 70 instances where more than one cable system has operated, or is attempting to operate, in a single community. These instances range from partial overbuilds to complete overbuilds. For example, in Allentown, Pa., one cable system has 35 channels and 50,000 basic subscribers, and a second system has 36 channels and 55,000 basic subscribers.

Finally, although this section does not address or solve any antitrust problems that the cities may or may not have, it is the first instance in legislation where a congressional committee has recognized and affirmed the legitimate right of the cities to award multiple cable franchises. Moreover, this bill is significant in that it does not address, and thus does not affect, the franchising process. That process is uniquely local in nature and this Committee does not intend to interfere with the rights of cities and cable operators to engage in contract negotiations for the furnishing of service to a community. Those contract rights are unaffected by S. 2172.

PROTECTION OF SUBSCRIBER PRIVACY

Section 610 provides that no cable operator, channel programer, or originator of broadband telecommunications may use the cable system to collect personally identifiable information with respect to a cable subscriber except with that subscriber's prior written consent. Such written consent is not required if the collection of information is solely for billing purposes or monitoring of unauthorized cable receptions. Section 610 also provides that personal information obtained through the use of the cable system shall not be disclosed without the subscriber's prior written consent or upon a lawful court order.

These provisions of section 610 reflect the Committee's belief that the development of new and diversified services over interactive two-way cable systems should not impact adversely upon the privacy of the individual. This section is not intended to impose unreasonable requirements. The Committee believes that potentially, the principal problem is the opportunity to monitor subscriber viewing habits and disclose such personally identifiable information without prior consent. Section 610 provides the necessary protection in this area.

CRIMINAL AND CIVIL LIABILITY

Section 611 provides that nothing in this title shall affect the criminal or civil liability of channel programers pursuant to the law of libel, slander, obscenity, incitment, invasions of privacy, false or misleading advertising, or other similar laws. The bill does not address the question of liability of cable operators under these laws except that they shall not be liable for any program carried on any of

the government-mandated access channels, as provided for in section 606, or for any programing originated by a programer unaffiliated with the operator.

EXECUTIVE JURISDICTION

Section 2 provides that, unless otherwise expressly provided in Title VI of the Communications Act of 1934, the Federal Government shall have exclusive jurisdiction over broadband telecommunications regarding matters covered by or otherwise within the purview of Title VI. This section further provides that any law of any State, subdivision, etc., existing on the effective date of Title VI, which is in conflict with the exclusive jurisdiction of the Federal Government, shall be deemed supuerseded, null and void, and of no effect.

Today cable faces major competition from such sources as MDS, MATV, SMATV, DBS, STV, television, radio, movie screens, videocassettes and videodiscs, LPTV, and other media. These services are by and large free from State and local intrusion into their business affairs. Thus, the Committee believes that there is no need for government at any level to continue to, or begin to unduly regulate or otherwise impose unnecessary restrictions on the cable industry.

The Committee believes that the increasely competitive marketplace demands a corresponding alleviation of and elimination of governmental regulations on cable. New Title VI establishes appropriate policy limitations on Federal, State and local regulation. Section 2 is intended to ensure that State and local authorities may not implement regulations or laws in a franchise agreement with the cable operator which would be inconsistent with Congressional policy in Title VI.

Section 2 is not intended to impede the initial franchise selection process as long as it is done within the guidelines set forth in Title VI. Nor is there anything that should prevent a city from negotiating truly voluntary agreements with the cable operator subsequent to the initial franchise process or at renewal. However, it is clearly the intent of this Committee that such arrangements should remain consistent with the objectives of this title.

NEW AND ADDITIONAL SERVICES

Section 3 simply adds a new section to the 1934 Act which provides that, consistent with sound spectrum management, the FCC shall, to the maximum feasible extent, encourage the introduction of new and additional services by new applicants, existing licensees, or others. It is further provided that such services shall be presumed to be in the public interest whenever the FCC finds that they are technically feasible without causing significant technical degradation to, or interference with, radio transmissions by other licensees.

If a competitive telecommunications marketplace is to flourish, ease of entry is essential. In the Omnibus Budget Reconciliation Act of 1981 (Public Law 97–35), Congress helped ease entry for those who wish to offer services by allowing the FCC to institute a random selection procedure for new licenses. This legislation is a complement to the current law. Its purpose is to foster new and additional services. In general, all potential providers of service should be allowed to

propose and then offer new and additional services, subject to the Commission's current and continued authority to determine that the offering of such services by those potential providers would serve the public interest. The regulatory process should not act as a barrier to those who wish to provide new and additional services.

The Committee believes that the forces of competition and technology will bring many new services to consumers, and cable is one of these services. In the past, the FCC has often hampered the development of new services. For example, the FCC imposed stringent regulations on cable, pay cable, and subscription television which delayed the introduction of these services in many areas for years. The Committee believes that the development of new technologies and the efforts of competitors seeking to respond to consumer demands will bring more services to the public than will administrative regulations. Hence, this section directs the FCC to encourage the development of such services.

These principles are explained in section 3 of the bill. The first sentence is a policy statement that, consistent with sound spectrum management, the FCC shall encourage the introduction of new and additional services by all potential providers, including new applicants, existing licensees, or other persons.

The second sentence states that in any proceeding in which new or additional services are proposed, such services shall be presumed to be in the public interest if the FCC finds that they are technically feasible without causing significant technical degradation to or interference with radio transmisisons by other licensees. Even if the FCC finds that such technical degradation or interference does occur, it is possible that the FCC may still find that authorizing such new or additional service is consistent with sound spectrum management, and is otherwise in the public interest. Conversely, new or additional services may be technically feasible but not be in the public interest because they are inconsistent with sound spectrum management.

Th presumption is rebuttable. If the presumption is rebutted, the FCC has the authority to make a finding as to whether these services are in the public interest. If the presumption is not rebutted, the services are deemed to be in the public interest.

An example of an argument that could be used to rebut the presumption is that there is another service that would make better use of this particular spectrum space. On the other hand, a claim that the new or additional service will provide competition that will take revenues from another service, either existing or proposed, will not be a valid rebuttal.

As a point of clarification, this provision is not directed to who should offer a service or to any restrictions against the provision of a particular service by anyone. The Commission's authority continues in these areas. This section is directed at the provision of services as a whole, not to individuals.

Furthermore, the mandate to encourage new services in section 3 is in no way intended to affect the Commission's responsibility to foster and maintain local services. Local services assure dissemination of information of local community interest and concern, and they provide a medium for local advertising. The Committee intends that

maintenance and development of local service remain an important factor in the allocation of spectrum.

Subsections (b) and (c) implement this policy by requiring that any petition or application to offer a new or additional service be acted upon by the FCC within 180 days of the filing thereof, or within 180 days of initiation of a proceeding by the FCC. It is not intended that these subsections create any new petition or application procedure, but only that such petitions or applications as may be filed for new classes of service pursuant to other sections of the Act be ruled upon expeditiously, in order that the public not be deprived of new services through administrative delay.

EFFECTIVE DATE

Section 4 provides that this act shall take effect on the date of enactment, except that parties to a franchise agreement have 60 days from the date of enactment within which to bring such agreement into compliance with this act. This 60-day period is provided for in order to allow enough time for both parties to complete any changes that may be required. However, the Committee believes that there should be little, if any, necessity for change or renegotiation. No retiering is necessary, as pointed out earlier; access channel levels are grandfathered; States, subdivisions, etc., are not now authorized to regulate cable services or telecommunications services; and the franchise fee ceiling provision merely codifies current FCC authority.

FEDERAL POLE LAW

The Pole Attachment Law was enacted in 1978 when Congress added section 224 to the Communications Act of 1934. This section directed the FCC to regulate the rates, terms, and conditions under which cable operators are afforded access to the poles and rights of way controlled by a utility that are essential to the provision of cable service. Omitted from the requirements of this law were cooperatively organized telephone and power utilities, and Government-owned utilities.

S. 2172, as reported, does not address the Federal Pole Law. However, there was some concern raised by cable operators and others that Congress needed to repeal the 5-year sunset provision (section 224(d) of the Communications Act of 1934) to prevent an interruption in FCC jurisdiction or an interruption in the application of the formula contained in that section.

The Committee solicited and received a letter from the FCC which satisfactorily addresses this question. Hence no repeal of this law has been included in this bill. A copy of this letter follows:

[U.S. Government Memorandum]

JULY 16, 1982.

DEAR CHAIRMAN FOWLER: You have asked for our views on the consequences of the Sunset provision in Section 224(d) of the Act which establishes a definition of reasonable rates that utilities may charge for use of their utility poles by cable television systems.

Under Section 224 of the Communications Act, 47 U.S.C. § 224, enacted February 21, 1978, the Commisison regulates "rates, terms, and conditions for cable television pole attachments to provide that such rates and terms are just and reasonable." Subsection 224(d) specifies in greater detail a definition of what constitutes just and reasonable rates.[1] Further, Subsection 224(e) provides that this definition shall cease to have effect five years after enactment of the Section (i.e. February 21, 1983).

It is our understanding, based on both the statutory language and the legislative history, that Subsection 224(d) was intended to provide the Commission with some initial guidance on how rates should be set. We also construe the legislative history as intending that, after some experience had been gained under the law, the Commission would have some flexibility in fixing the "just and reasonable" standard. In other words, at the end of the five-year period, the Commission would be left to its discretion to continue using the standard specified in Section 224(d) or alternatively, to consider use of some other standard. Significantly, at the time the Commission adopted the current rules implementing the statute, parties asked the Commission to incorporate a sunset provision into those of its rules which incorporated the statutory "just and reasonable" definition. The Commission specifically declined to do so stating:

"The purpose of the condition subsequent to Section 224(e) is to permit the Commission greater discretion in setting just and reasonable rate standards after it gains the experience necessary to regulate independently of the legislative guidance of Section 224(d)(1). Apprising those referring to our rules of a termination date of the effectiveness of the subsection could cause some to erroneously conclude that in five years the Commission will no longer have the jurisdiction to set rate standards or that it must do away with the Section 224(a)(1) standard."

First Report and Order in CC Docket 87–144, 68 FCC 2d 1585 (1978) at para. 41.

In short, the sunset provision of Section 24(e) does not require any change by the Commission from either the procedural or substantive standards now in use. The subsection provides the Commission discretion to subsequently consider the use of some other standard. Further, since the definition found in Subsection 224(d) was adopted verbatim into Commission's Rules [See, 47 C.F.R. §1.1409(c)], any change would require appropriate procedures under the Administrative Procedures Act.

GARY M. EPSTEIN.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act

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[1] Specifically, a rate is just and reasonable if it "'assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way." "Usable space" is further defined in Subsection (d)(2).

of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., July 30, 1982.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 2172, the Cable Telecommunications Act of 1982, as ordered reported by the Senate Committee on Commerce, Science, and Transportation, July 22, 1982.

S. 2172 would establish guidelines for Federal, State and local regulatory authorities in the area of cable systems. It would require the Federal Communications Commission (FCC) to conduct rulemaking regarding foreign ownership, access channels and franchise fees. Based on information from the FCC, it is estimated that approximately 10 staff-years would be required in fiscal year 1983 to complete the rulemakings, at an estimated cost of approximately $400,000.

It is estimated that in 1984, and in each year thereafter, approximately 4 staff-years would be required to monitor cable system activity in domestic and foreign markets to ensure equitable access and treatment. In addition, it is estimated that approximately 10 staff-years in 1984, 8 staff-years in 1985, and 6 staff-years in each fiscal year thereafter would be required to collect and analyze market access data. The total cost for these activities is estimated to be $600.000 in 1984, and approximately $500,000 in 1985 and each year thereafter.

As a result of this bill, the FCC may also experience more activity in the area of protection of subscriber privacy rights. Furthermore, it is possible that a greater number of requests will be made for waivers of the rules governing franchise fees. It is not possible at this time to estimate precisely the extent to which these two provisions would increase the workload of the FCC; however, the additional cost, if any, is not expected to be significant.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation:

S. 2172, as reported, would eliminate some present regulatory obligations undertaken by the FCC in the cable field and, in doing so, reduce the need for administrative resources in these areas. The bill would also create additional regulatory responsibilities for the FCC and may, therefore, require the assignment of additional resources. Finally, S. 2172 would clarify or ratify existing FCC authority in a number of

cable areas and, therefore, would preserve the need for assignment of administrative resources in these areas.

There are a number of provisions in S. 2172 that would add to existing regulatory responsibilities now undertaken by the FCC. Section 605 of the proposed legislation would confer upon the FCC the authority to restrict or limit ownership and operation of cable systems by persons from foreign countries if these foreign countries impose restrictions or limitations on ownership and operation by U.S. cable enterprises. Thus far, the FCC has declined to impose such regulation on foreign entry into the U.S. cable market. Although FCC exercise of authority under this section is discretionary, if the FCC were to decide that such regulation was needed, additional resources would be necessary to explore the possibility of effective regulation in this area as well as to administer and enforce any regulations subsequently adopted.

Section 606 would also improve new regulatory obligations on the FCC. Under section 606(d), in order to assess continued need for mandatory public and other access, the FCC is obligated to determine whether "reasonably available alternatives" exist in an area or market. Accordingly, there would be a need for an increase in resources to assess exemptions from these requirements.

Section 608 of the bill would basically codify the FCC's existing regulations relating to reasonable ceilings on cable franchise fees. The FCC presently has a pending proceeding (Docket 21002) which has under consideration possible elimination of restrictions on franchise fees. Section 608 of the proposed legislation would require continued FCC oversight of franchise fees and the continued allocation of existing resources in this area.

There is a specific withdrawal from regulation with respect to cross-ownership between cable systems and other media (section 605(a)). Further, section 607(b) restricts the authority of government at any level to "regulate or restrict the provision of or nature of cable services offered over a cable system," and section 607(c) contains the same restriction as it applies to telecommunications facilities and services.

Other existing regulations are unchanged, including such matters as signal carriage (must carry rules, network nonduplication, and sports blackout rules), equal employment opportunity rules, telephone, cross-ownership rules, pole attachment rules, technical standards (radiation and nondegradation), forms and information collection, and Fairness Doctrine and equal time rules. Other content control rules for nonbasic service, including lottery, obscenity, and sponsorship identification rules would be eliminated by section 607(b).

Finally, the remainder of the bill, as well as section 3 which has provisions for new and additional services, should not have any appreciable regulatory impact.

The Committee does not anticipate any increase in FCC staff as a result of this bill. It believes that the FCC should be able to administer its responsibilities within currently available resources.

The Committee does not intend that this measure authorize the enactment of any additional budget authorization for fiscal year 1983. The Committee intends that any fiscal year 1983 costs incurred from the enactment of the bill will be absorbed by the FCC.

SECTION-BY-SECTION ANALYSIS

SECTION 1—TITLE VI—CABLE TELECOMMUNICATIONS ACT OF 1982

This amends the Communications Act of 1934 by inserting immediately after title V the new title VI, the Cable Telecommunications Act.

Section 601—Findings

(1) Cable systems are engaged in interstate commerce through the origination, transmission, distribution, and dissemination of broadband services.

(2) The provision of cable is of concern to all entities.

(3) A uniform national policy for cable can serve to eliminate and prevent conflicting regulations in order to allow unhampered growth of cable as a competitive medium responsive to the needs and interests of the public.

Section 602—Purposes

(1) One purpose of the bill is to establish a national policy concerning cable and to encourage a competitive environment for the growth and development of cable.

(2) A second purpose is to establish guidelines for the exercise of Federal, State, and local regulatory authority.

(3) A third purpose of the bill is to allow cable to compete free of unnecessary restrictions.

Section 603—Definitions

For purposes of this title, the definitions of the terms are:

(1) "Basic service" means the provision of retransmission of broadcast signals and public, educational, and governmental programing which is distributed by a coaxial cable or any other closed transmission medium.

(2) "Basic telephone service" means service provided through a switched network capable of providing two-way voice grade communications.

(3) "Broadband telecommunications" means any receipt or transmission of electromagnetic signals over one or more coaxial cables or any other closed transmission medium.

(4) "Broadcasting" means telecommunications by radio intended to be received by the public, directly or by the intermediary of relay stations.

(5) "Cable channel" or "channel" means that portion of the electromagnetic frequency spectrum used in a cable system for the propagation of an electromagnetic signal.

(6) "Cable operator" or "cable system operator" means any person or persons, or an agent or employee thereof, that operates a cable system, or that directly or indirectly owns a significant interest in any cable system, or that otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

(7) "Cable service" means the provision by a channel programer of one-way programing on a per-channel, per-program, or other basis which is distributed by coaxial cable or any other closed transmission medium, but such term shall not include basic service.

(8) "Cable subscriber" means any person who receives or transmits electromagnetic signals distributed or disseminated by a cable operator or a channel programer over a cable system.

(9) "Cable system" means a facility or combination of facilities under the ownership or control of any person or persons, which consists of a primary control center used to receive and retransmit, or to originate broadband telecommunications service over one or more coaxial cables, or other closed transmission media, from the primary control center to a point of reception at the premises of a cable subscriber, but such term does not include (A) a facility or combination of facilities that serves only to retransmit the television signals of television broadcast stations; (B) a facility or combination of facilities that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management; (C) a system serving fewer than 2,000 subscribers; or (D) a common carrier subject to the provisions of title II of this act whenever such carrier transmits broadband telecommunications services.

(10) "Channel programer" means any person having an agreement to provide basic service or cable service to a cable system operator, or any person who leases, rents, or is otherwise authorized to use the facilities of a cable system for the provision of basic service or cable service, and such term shall include a cable system operator to the extent that such operator, or person or persons under common ownership or control with such operator, is engaged in the provision of such service.

(11) "Closed transmission medium" or "closed transmission media" means media having the capacity to transmit simultaneously electromagnetic signals over a common transmission path such as coaxial cable, optical fiber, wire, waveguide, or other such signal conductor or device.

(12) "Information" means knowledge or intelligence represented by any form of writing, signs, signal, pictures, sounds, or other symbols.

(13) "Law" means any regulation, rule, order, standard policy requirement procedure, or restriction.

(14) "Person" means an individual, partnership, association, joint stock company, trust, or corporation.

(15) "Telecommunications" means the transmission of information by electromagnetic means, with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission.

(16) "Telecommunications carrier" or "carrier" means any person, including any government or quasi-government entity, which offers any telecommunications service or facilities used by any person to provide telecommunications services, except that a person engaged in broadcasting, or in providing basic service or cable service, shall not, insofar as such person is so engaged, be deemed a carrier.

(17) "Telecommunications service" means the offering of telecommunications facilities, or of telecommunications by means of such facilities but such term shall not include basic service or cable service.

(18) "United States" means the several States and territories, the District of Columbia, and the possessions of the United States.

Section 604—Statement of authority

(1) The FCC shall have jurisdiction over cable in accordance with the provisions of this act and other applicable laws.

(2) States, subdivisions, etc. are granted the authority to award a cable franchise.

Section 605—Ownership or control of cable systems

(a) This section prohibits Federal, State, or local regulation or restriction of ownership by any person by reason of that person's ownership of any other media interests, including broadcast, cable, newspaper, programing service, or other printed or electronic information service.

(b) This section gives the FCC authority to prohibit foreign ownership of cable if no reciprocal rights are granted to U.S. companies. Current foreign-owned cable systems are grandfathered for the life of the franchise, and for any renewal.

(c) Municipal ownership is allowed; municipal acquisition is permitted but only at fair market value based upon the ongoing business value of the system, including good will, and if there is no control over the content of any programing.

Section 606—Access channels

(a) and (b) Cable systems with 20 or more channels must set aside for access, from avilable channels:

(1) Ten percent for use by public, educational, and governmental programers; and

(2) Ten percent for use by other channel programers.

(c) The term "available" means channels actually and technically available for use and not subject to other use requirements imposed by the FCC.

(d) The obligation to provide access channels shall cease if the FCC determines that there are reasonably available alternatives for persons desiring to provide programing service to the public in a particular geographic area or market.

(e) The access channels may not be available for use by the cable operator or any entity affiliated with such operator.

(f) The franchisor may establish rules for the use of the public, educational, and governmental channels, and the cable operator may establish rules for the use of the other channels. Programing may be combined by the operator on fewer channels until sufficient demand for full-time use of dedicated channels develops, and unused channels may be used by the cable operator until there is a demand.

(g) The cable operator may make available, in his sole discretion, additional channels to public, educational, governmental, and other programers.

(h) Any access provision in a franchise agreement in existence on March 4, 1982, which exceeds the 10 percent set aside for public, educational, and governmental programers, and/or the 10 percent set aside for other programers, is grandfathered for the life of the franchise agreement at that level. At the end of the franchise term, the Federal standard would apply.

Section 607—Regulation of rates and services

(a) Each State, subdivision, etc., may regulate the rates charged by cable operators for the use of channels for basic service, or charged to subscribers for those basic services.

(b) No entity (Federal, State, or local) shall have authority to regulate or restrict the provision of or nature of telecommunications facilities offered by or telecommunications services offered over a cable system, except for the provision of basic telephone service.

Section 608—Franchise fees

(a) The FCC shall establish a reasonable franchise fee ceiling paid by cable operators to States, et cetera, to permit only the recovery of the reasonable cost of regulation, and the FCC may review and adjust the ceiling upon its own motion or upon petition.

(b) The FCC may waive the fee ceiling if appropriate evidence is presented by the franchisor that the reasonable cost of regulation exceeds the ceiling, and that the waiver will not interfere with the effectuation of Federal goals and policies.

Section 609—Renewals and extensions

(a) The franchisor shall grant a renewal or extension to the cable operator if it finds that:

(1) the operator has substantially complied with the material terms of the franchise and with other laws;

(2) there has been no material change in the legal, technical, or financial qualifications of the operator which would impair service; and

(3) the services and facilities to be provided are reasonable.

(b) There is a specific grant of authority to States, cities, et cetera, to accept competing applications for cable franchises, and to award multiple cable franchises.

Section 610—Protection of subscribed privacy

(a) No one may intercept or receive broadband telecommunications unless authorized to do so.

(b) and (c) Broadband telecommunications means a "wire communication" within the meaning of the Federal wiretapping laws.

(d) The cable system cannot be used to collect personally identifiable information about a subscriber.

(e) No cable operator shall disclose personally identifiable information about a subscriber except upon prior written subscriber consent or pursuant to a lawful court order.

(i) The remedies for violations of this section include civil damages.

Section 611—Criminal and civil liability

Channel programers remain subject to criminal and civil liability for libel, slander, and so forth, but cable operators are not liable for programs carried on any of the access channels, or for programs originated by unaffiliated programers.

SECTION 2—EXCLUSIVE JURISDICTION

(a) The Federal Government shall have exclusive jurisdiction over broadband telecommunications regarding matters covered by or otherwise within the purview of this act.

(b) Any State or local law in effect on the effective date of this act which is in conflict with any matters over which the Federal Government has exclusive jurisdiction is superseded, null and void, and of no effect.

SECTION 3—NEW AND ADDITIONAL SERVICES

This section provides that, consistent with sound spectrum management, the FCC shall encourage new and additional services by new applicants, existing licensees, or other persons. Such services shall be presumed to be in the public interest whenever the FCC finds that they are technically feasible without causing significant technical degradation to, or interference with, radio transmissions by other licensees.

SECTION 4—EFFECTIVE DATE

The parties to a franchise agreement have 60 days from the date of enactment to bring the agreement into compliance with the provisions of this act.

SECTION 5—REDESIGNATION

The existing title VI of the Communications Act of 1934 is redesignated as title VII.

ROLLCALL VOTES IN COMMITTEE

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following record votes during its consideration of S. 2172:

Amendment offered by Senator Gorton to delete section 609 relating to renewals and extensions:

NAYS—7	YEAS—4
Mr. Packwood	Mr. Danforth [1]
Mr. Goldwater	Mr. Pressler [1]
Mr. Schmitt [1]	Mr. Gorton
Mrs. Kassebaum	Mr. Hollings [1]
Mr. Stevens [1]	
Mr. Kasten	
Mr. Cannon	

[1] By proxy.

Amendment offered by Senator Cannon to provide for deregulation of cable in certain cases:

NAYS—11	YEAS—4
Mr. Packwood	Mr. Cannon
Mr. Goldwater	Mr. Long [1]
Mr. Schmitt [1]	Mr. Hollings [1]
Mr. Danforth [1]	Mr. Ford [1]
Mrs. Kassebaum	
Mr. Pressler [1]	
Mr. Gorton	
Mr. Stevens [1]	
Mr. Kasten	
Mr. Riegle [1]	
Mr. Heflin	

[1] By proxy.

Amendment offered by Senator Kasten to provide for an additional franchise fee of 3 percent to be paid by cable operators for programing:

NAYS—7	YEAS—3
Mr. Packwood	Mr. Gorton
Mr. Goldwater	Mr. Kasten
Mr. Schmitt [1]	Mr. Riegle [1]
Mrs. Kassebaum	
Mr. Stevens [1]	
Mr. Cannon	
Mr. Heflin	

[1] By proxy.

On motion of Senator Packwood to report S. 2172, with an amendment in the nature of a substitute:

YEAS—13	NAYS—3
Mr. Packwood	Mr. Danforth [1]
Mr. Goldwater	Mr. Gorton
Mr. Schmitt [1]	Mr. Exon [1]
Mrs. Kassebaum	
Mr. Pressler [1]	
Mr. Stevens [1]	
Mr. Kasten	
Mr. Cannon	
Mr. Long [1]	
Mr. Hollings [1]	
Mr. Ford [1]	
Mr. Riegle [1]	
Mr. Heflin	

[1] By proxy.

Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

The Communications Act of 1934

New section 7 of that Act.

NEW AND ADDITIONAL SERVICES

Sec. 7. (a) Consistent with sound spectrum management, the Commission shall, to the maximum feasible extent, encourage the introduction of new and additional services by new applicants, existing licensees, or other persons. In any proceeding in which new or additional services are proposed, such services shall be be presumed to be in the public interest whenever the Commission finds that such serv-

ices are technically feasible without causing significant technical degradation to or interference with radio transmissions by other licensees.

(b) Any person may file with the Commission a petition to establish or an application to offer a new or additional service.

(c) The Commission must determine whether the new or additional service proposed in a petition or application is in the public interest within 180 days after such petition or application is filed. If the Commission initiates its own proceeding for a new or additional service, such proceeding must be completed within 180 days after it is initiated.

New Title VI of that Act.[1]

TITLE VI—CABLE TELECOMMUNICATIONS ACT

FINDINGS

SEC. 601. The Congress hereby finds that—

(1) Cable systems are engaged in interstate commerce through the origination, transmission, distribution, and dissemination of broadband telecommunications services;

(2) the provision of cable telecommunications is of concern to governmental entities; and

(3) a uniform national policy for cable can serve to eliminate and prevent conflicting regulations in order to allow unhampered growth and development of cable as a competitive medium which will be responsive to and serve the needs and interests of the public.

PURPOSES

SEC. 602. The purposes of this Act are to—

(1) establish a national policy concerning cable telecommunications and to encourage a competitive environment for the growth and development of cable telecommunications;

(2) establish guidelines for the exercise of Federal, State, and local regulatory authority; and

(3) allow cable systems to compete in the marketplace free of unnecessary restrictions.

DEFINITIONS

SEC. 603. For purposes of this title, the term—

(1) "basic service" means the provision of retransmission of broadcast signals and public, educational, and governmental programing which is distributed by coaxial cable or any other closed transmission medium;

(2) "basic telephone service" means service provided through a switched network capable of providing two-way voice grade communications;

(3) "broadband telecommunications" means any receipt or transmission of electromagnetic signals over one or more coaxial cables or any other closed transmission medium;

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[1] Pursuant to section 5 of the reported bill, the current title VI of the Communications Act of 1934, which consists of sections 601 through 609, is redesignated as title VII consisting of sections 701 through 709, respectively.

(4) "broadcasting" means telecommunications by radio intended to be received by the public, directly or by the intermediary of relay stations;

(5) "cable channel" or "channel" means that portion of the electromagnetic frequency spectrum used in a cable system for the propagation of an electromagnetic signal;

(6) "cable operator" or "cable system operator" means any person or persons, or an agent or employee thereof, that operates a cable system, or that directly or indirectly owns a significant interest in any cable system, or that otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;

(7) "cable service" means the provision by a channel programer of one-way programing on a per-channel, per-program, or other basis which is distributed by coaxial cable or any other closed transmission medium, but such term shall not include basic service;

(8) "cable subscriber" means any person who receives or transmits electromagnetic signals distributed or disseminated by a cable operator or a channel programer over a cable system;

(9) "cable system" means a facility or combination of facilities under the ownership or control of any person or persons, which consists of a primary control center used to receive and retransmit, or to originate broadband telecommunications service over one or more coaxial cables, or other closed transmission media, from the primary control center to a point of reception at the premises of a cable subscriber, but such term does not include: (A) a facility or combination of facilities that serves only to retransmit the television signals of television broadcast stations; (B) a facility or combination of facilities that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management; (C) a system serving fewer than 2,000 subcribers; or (D) a common carrier subject to the provisions of title II of this Act whenever such carrier transmits broadband telecommunications services;

(10) "channel programer" means any person having an agreement to provide basic service or cable service to a cable system operator, or any person who leases, rents, or is otherwise authorized to use the facilities of a cable system for the provision of basic service or cable service, and such term shall include a cable system operator to the extent that such operator, or person or persons under common ownership or control with such operator, is engaged in the provision of such service;

(11) "closed transmission medium" or "closed transmission media" means media having the capacity to transmit simultaneously electromagnetic signals over a common transmission path such as coaxial cable, optical fiber, wire, waveguide, or other such signal conductor or device;

(12) "information" means knowledge or intelligence represented by any form of writing, signs, signal, pictures, sounds, or other symbols;

(13) "law" includes any regulation, rule, order, standard, policy, requirement, procedure, or restriction;

(14) "person" means an individual, partnership, association, joint stock company, trust, or corporation;

(15) "telecommunications" means the transmission of information by electromagnetic means, with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) essential to such transmission;

(16) "telecommunications carrier" or "carrier" means any person, including any government or quasi-government entity, which offers any telecommunications service or facilities used by any person to provide telecommunications services, except that a person engaged in broadcasting, or in providing basic service or cable service, shall not, insofar as such person is so engaged, be deemed a carrier;

(17) "telecommunications service" means the offering of telecommunications facilities, or of telecommunications by means of such facilities but such term shall not include basic service or cable service; and

(18) "United States" means the several States and territories, the District of Columbia, and the possessions of the United States.

STATEMENT OF AUTHORITY

SEC. 604. The provisions of this title shall apply as follows:

(1) The Commission shall have jurisdiction and exercise authority with respect to broadband telecommunications in accordance with the provisions of this Act and other applicable provisions of law.

(2) Nothing in this Act shall be construed as prohibiting any State or political subdivision or agency thereof, or franchising authority, from awarding, in accordance with the provisions of this Act, a cable franchise within its jurisdiction.

OWNERSHIP OR CONTROL OF CABLE SYSTEMS

SEC. 605. (a)(1) Except in the case of the antitrust laws of the United States and to the extent otherwise provided in subsections (b) and (c) of this section, no executive agency of the United States, including the Commission, shall have the authority to prohibit, directly or indirectly, the ownership of cable systems by any person by reason of that person's ownership of any other media interests, including broadcast, cable, newspaper, programing service, or other printed or electronic information service.

(2) No State or political subdivision or agency thereof, or franchising authority, shall have the authority to prohibit, directly or indirectly, the ownership of cable systems by any person by reason of that person's ownership of any other media interests, including broadcast, cable, newspaper, programing service, or other printed or electronic information service.

(b)(1) Notwithstanding the provisions of subsection (a) of this section, for the purpose of ensuring fair and equitable treatment of

United States cable enterprises seeking access to markets in a foreign country, the Commission shall have authority to conduct inquiries and establish policies, rules, regulations, and requirements applicable to foreign persons from that country seeking access to domestic markets in the United States in connection with the construction, ownership, and operation of cable enterprises with a view to assuring that such United States cable enterprises are permitted access to such foreign markets upon terms and conditions which are reciprocal with the terms and conditions under which such foreign persons have access to domestic markets in the United States.

(2) For purposes of this subsection, the term "foreign persons" includes any individual who is not a citizen of the United States, any subsidiary (although established under the laws of the United States or any State thereof) of a corporation or other business entity which was established under the laws of a foreign country, any corporation or other business entity established under the laws of a foreign country, or any corporation or other business entity established under the laws of the United States or any State thereof, if 25 percent or more of the capital stock or equivalent ownership is owned or controlled by an individual who is not a citizen of the United States or by a corporation or other business entity established under the laws of a foreign country, or any subsidiary of a corporation or other business entity established under the laws of a foreign country.

(3) The Commission shall adopt such regulations, rules, orders, and procedures, and may impose such restrictions as it determines to be necessary or appropriate to carry out the provisions of this subsection.

(4) No such regulation, rule, order, procedure, or restriction issued or imposed pursuant to paragraph (3) of this subsection shall be applicable to any cable franchise awarded, or for which proposals are pending, prior to the effective date of this title, or to the renewal or other extension of such franchise.

(c) Notwithstanding the provisions of subsection (a) of this section, a State or political subdivision or agency thereof, or franchising authority, may not acquire an ownership interest in any cable system, unless such State, subdivision, agency, or authority acquires such ownership or interest at not less than fair market value based upon the ongoing business value of the system, including good will. In any case in which any such State, subdivision, agency, or authority has or acquires any such ownership or interest, such State, subdivision, agency, or authority shall, in no case, own or control, directly or indirectly, the content of any of the programing on such cable system except as provided in section 606(b)(1).

ACCESS CHANNELS

SEC. 606. (a) Each cable system having 20 or more television broadcast channels (120 MHz or more of bandwidth) shall dedicate or set aside access channels for use by public, educational, governmental, and other channel programers in accordance with subsection (b) of this section.

(b) Any cable system operator subject to subsection (a) of this section, shall dedicate or set aside for access, from available channels—

(1) 10 percent of such available channels for use by public, educational, and governmental channel programers; and

(2) 10 percent of such available channels for use by other channel programers.

(c) For purposes of this section, the term "available channels" means channels actually and technically available for use by the cable operator and not subject to other use requirements imposed by the Commission.

(d) (1) The obligation to provide access channels imposed under this section shall cease upon determination by the Commission that there are reasonably available alternatives for persons desiring to provide programing service to the public in a particular geographic area or market.

(2) In determining whether there are reasonably available alternatives in the relevant area or market, the Commission shall consider—

(A) the number and size of other providers of programing service;

(B) the extent to which programing service is available from other providers;

(C) the abiilty of such other providers to make programing service readily available at comparable rates, terms, and conditions; and

(D) other indicators of the extent of competition.

(e) The channels dedicated or set aside for access pursuant to this section shall not be available for use by the cable system operator or any entity affiliated with such operator.

(f) (1) The franchisor is authorized to establish rules and procedures for the use of the channels set aside or dedicated pursuant to clause (1) of subsection (b) of this section.

(2) The cable system operator is authorized to establish rules and procedures for the use of the channels set aside or dedicated pursuant to clause (2) of subsection (b) of this section.

(3) Notwithstanding the provisions of subsection (e) and the provisions of paragraphs (1) and (2) of this subsection, until such time as there is demand for each channel full time for its designated use, public, educational, governmental, and other channel programing may be combined by the cable system operator on one or more channels, and to the extent time is available on such channels, they may be used by the cable system operator for the provision of other services.

(g) Nothing in this section shall be construed as prohibiting a cable system operator from making available, in his sole discretion, additional channels to public, educational, governmental and other programers.

(h) (1) In any case in which a cable franchise was awarded pursuant to a franchise agreement prior to March 4, 1982, by any State or political subdivision or agency thereof, or franchising authority, and that agreement provides for a percent of channels for use by public, educational, and governmental channel programers to be dedicated or set aside for access which is in excess of the 10 percent required under clause (1) of subsection (b) of this section, or provides for a percent of

channels for use by other channel programers to be dedicated or set aside for access which is in excess of the 10 percent required under clause (2) of subsection (b) of this section, nothing in the provisions of subsections (a) and (b) of this section shall be construed as requiring the modification of such franchise agreement in order to bring such agreement into conformity with such subsections. Except as otherwise provided in accordance with subsection (d) of this section, in no case shall any such agreement be modified, on or after the effective date of this title, so as to provide for the dedication or set-aside for access of such channels at a percent less than that provided for in clauses (1) and (2) of subsection (b) of this section or greater than that provided for in such agreement as of the effective date of this title.

(2) If the term of any franchise agreement referred to in paragraph (1) of this subsection is renewed or otherwise extended on or after the effective date of this title, the provisions of subsections (a) and (b) of this section shall be applicable to such franchise agreement.

REGULATION OF RATES AND SERVICES

SEC. 607. (a) Each State or political subdivision or agency thereof, or franchising authority, is authorized to establish, fix, or otherwise restrict the rates charged by cable operators for the use of channels for the provision of basic service, or charged to subscribers by cable operators for such basic service.

(b) No executive agency of the United States, including the Commission, and no State or political subdivision or agency thereof, or franchising authority, shall have authority to regulate or restrict the provision of or nature of cable services offered over a cable system.

(c) No executive agency of the United States, including the Commission, and no State or political subdivision or agency thereof, or franchising authority, shall have authority to regulate or restrict the provision of or nature of telecommunications facilities offered by or telecommunications services offered over a cable system, except with respect to the provision of basic telephone service.

FRANCHISE FEES

SEC. 608. (a) The Commission shall establish a reasonable ceiling for the fees to be paid to a State or political subdivision or agency thereof, or franchising authority, by operators of cable systems receiving franchises from such State, subdivision, agency, or authority and, periodically upon its own motion or upon petition, may review the appropriateness of such ceiling and make adjustments thereto. The Commission shall establish such ceiling so as to permit only the recovery by such State, subdivision, agency, or authority of the reasonable cost of regulation of such cable system.

(b) The Commission may waive the franchise fee ceiling established in subsection (a) if, upon a reasonable showing, the franchisor can demonstrate that the reasonable cost of regulation exceeds such ceiling and that such waiver will not interfere with the effectuation of Federal goals and policies established pursuant to this title.

(c) The Commission shall prescribe procedures necessary to carry out the provisions of this section within the 180-day period following the effective date of its enactment.

RENEWALS AND EXTENSIONS

SEC. 609. (a) In any case in which a cable system operator submits an application to the franchisor for the renewal or other extension of such operator's franchise authorization, the franchisor shall grant such renewal or other extension if it finds that—

(1) the cable system operator has substantially complied with the material terms of such franchise and with applicable law;

(2) there has been no material change in the legal, technical, or financial qualifications of the cable system operator that would substantially impair the continued provision of service by such operator; and

(3) the services and facilities to be provided by such operator are reasonable in light of the size, nature, needs, and interests of the community to be served, the age and status of the existing system, the current availability of facilities and services in communities of comparable size and characteristics, and the costs of construction and operation of cable facilities.

(b) Nothing in this Act shall be construed as prohibiting the filing of competing applications for cable franchises, or as prohibiting the award of multiple cable franchises by a State or political subdivision or agency thereof, or franchising authority.

PROTECTION OF SUBSCRIBER PRIVACY

SEC. 610. (a) No person or governmental authority shall intercept or receive broadband telecommunications unless specifically authorized to do so by a cable system operator, channel programer, or originator of broadband telecommunications or as may otherwise be specifically authorized by Federal law.

(b) In order to safeguard the right to privacy and security of broadband telecommunications, such broadband telecommunications shall be deemed to be a "wire communication" within the meaning of section 2510(1) of title 18 of the United States Code.

(c) In the event that there may be any difference between the provisions of this section and chapter 119 of title 18 of the United States Code, or any regulations promulgated thereunder, it is the intent of the Congress that such chapter 119 shall be controlling.

(d) (1) Except as provided in paragraph (2) of this subsection, no cable operator, channel programer, or originator of broadband telecommunications may use the cable system to collect personally identifiable information with respect to a cable subscriber, except upon the prior written consent of that subscriber.

(2) The provisions of paragraph (1) of this subsection shall not apply to the collection of information solely for billing purposes or to monitor whether there is unauthorized reception of cable telecommunications.

(3) A cable operator, channel programer, or originator of broadband telecommunications shall ensure that any such information is

destroyed when the information is no longer used or to be used for the purposes for which it was collected.

(e) No cable operator, channel programer, or originator of broadband telecommunications shall disclose personally identifiable information obtained pursuant to subsection (d) of this section with respect to a cable subscriber, or personally identifiable information with respect to the services provided to or received by a particular cable subscriber by way of a cable system, except upon the prior written consent of the subscriber, or pursuant to a lawful court order authoring such disclosure.

(f) If a court shall authorize or order disclosure, the cable subscriber shall be notified of such order by the person to whom such order may be directed, within a reasonable period of time before the disclosure is made, but in no event less than 14 calendar days.

(g) Each cable operator shall, at the time of entering into an agreement to provide cable telecommunications, and regularly thereafter, inform every subscriber of the rights of the subscriber under this section. Such information shall include a description of the nature of the information to be maintained by the cable operator, channel programer, or originator of broadband telecommunications, and the location and availability of such information.

(h) A cable subscriber shall have access to all personally identifiable information regarding that subscriber which is collected and maintained by a cable operator, channel program, or originator of broadband telecommunications. Such information shall be available to the subscriber at reasonable times and at a place designated by the cable operator, channel programer, or originator of broadband telecommunciations.

(i) Any cable subscriber whoe privacy is violated in contravention of this section, shall be entitled to recover civil damages as authorized and in the manner set forth in section 2520 of title 18 of the United States Code. This remedy shall be in addition to any other remedy available to such subscriber.

CRIMINAL AND CIVIL LIABILITY

SEC. 611. Nothing in this title shall be deemed to affect the criminal or civil liability of channel programs pursuant to the law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that the cable operator shall not incur such liability for any program carried on any public, educational, governmental, or other channel referred to in paragraphs (1) and (2) of subsection (b) of section 606, or for any program originated by a channel programer having no ownership affiliation with the cable system operator.

ADDITIONAL VIEWS OF MR. KASTEN

I am joining the Committee decision to report S. 2171, which deals with the regulatory status of cable television systems. Nevertheless, there is one provision of the original bill which was deleted in the revision process and which I believe deserves further serious consideration. That provision relates to cable's use of distant signal professional sports programming.

Under section 111 of the Copyright Revision Act, cable systems may pick up and sell to their subscribers any professional sports contests which appear on conventional television. The systems may do so without the consent—indeed over the objections—of the clubs which have created the games at great effort and expense. This situation not only deprives the clubs of adequate compensation for the use of their product (the average cable system pays only about $3 in statutorily-prescribed compulsory licensing royalties for each telecast). It also results in the clubs having to contend with literally hundreds of league telecasts being imported into their home territories, upon which they depend for gate receipts and broadcast revenues.

The original version of S. 2172 would have required cable systems within 50 miles of professional sports clubs to bargain in the marketplace for the right to import the distant signal programming of other league members—rather than have access to the programs over the objections of the copyright owners. It was concluded, however, that the sports/cable issue was not an appropriate one to be considered in this piece of communications legislation. Thus, the provision was deleted.

It has long been recognized that the accommodation of the rights of program producers and cable systems can be considered either as a matter of copyright law or communications law. There is, in fact, a bill currently pending before the House Commerce Comittee (H.R. 5949) that amends the compulsory license provisions of the copyright laws to respond to the interests of other program suppliers, such as motion picture producers, and broadcasters. An amendment was offered before the House Judiciary Committee to provide similar equitable protection for professional sports, but it failed by a close 13–11 vote.

I strongly believe that the sports/cable issue should be resolved when and if the copyright legislation is reecived here in the Senate. After such legislation has come to the Senate, I intend to be a strong advocate of a thorough discussion to try to resolve this problem. I am convinced that fair consideration of the equitable interests of professional sports and cable systems need to be balanced so each may continue to provide services to communities.

BOB KASTEN.

ADDITIONAL VIEWS OF MR. CANNON

I voted to report the cable bill out of Committee, but I must admit that I am not very enthusiastic about what we have done. My hope is that the Committee bill will become the focus for a truly significant effort to reduce Government regulation and promote competition in the telecommunications industry, a goal that I believe is shared by the men and women who work in the cable industry outside of Washington. Certainly, this bill is a major departure from the Committee's bipartisan support for deregulation of the industries under its jurisdiction.

Not only has the Committee failed to endorse deregulation, it has permitted Government oversight over cable in a way that is about as damaging to the interests of the cities as any that could be envisioned. On the bill's face, the cities are given nominal authority to regulate cable, but the apparent intention is to tie their hands so tightly that this power to regulate is at best illusory. Such a strong preference is given existing cable operators that a virtual endless monopoly by current incumbents seems to be contemplated. The cities would certainly be better off with total deregulation than that situation. In other words, as it currently stands, we may have crafted the proverbial "worst of all worlds".

Perhaps most perplexing of all, however, is the attitude of the cable industry to the legislation. Simply put, the cable industry came to the Senate and made a compelling and persuasive case for deregulation, and then inexplicably the cable association in Washington gave the concept such a lukewarm reception that it never stood a chance. Indeed, these cable representatives in Washington actually lobbied, repeatedly, against the concept of true deregulation.

Before discussing the question of deregulation in more detail, I want to comment on the amendment offered by Senator Gorton that was defeated by the Committee. I voted against the amendment, but in retrospect I should not have. The so-called automatic right of renewal is certainly the most objectionable part of the bill. It could be construed as granting a perpetual monopoly to the first cable operator in each community. It is difficult to think of a provision that could be more anticompetitive.

I was prepared to vote, and did vote, to keep the right of renewal language in the bill because of a commitment to total deregulation at a date certain in the future, that is, acceptance of and active support for the Hollins/Cannon Amendment to deregulate the industry after 5 years. I had the clear understanding that the cable industry, through its trade association, favored and would actively support such a deregulation proposal as the bill moved toward "mark-up". Had I known my assumptions were wrong prior to the executive session, I would have supported Senator Gorton's amendment. I trust the Gorton

amendment will be offered on the floor so the full Senate will have an opportunity to evaluate that proposal, and perhaps others.

With respect to the issue of deregulation, I continue to believe Congress has an opportunity to prevent the establishment of a system of comprehensive Government regulation before it becomes too painful to dissolve. There is much talk about over-regulation and bloated Government agencies hampering legitimate business enterprises. Here, Congress has a real opportunity to do something about it.

The Committee has acted to accept the "need" to regulate cable television without giving sufficient thought to that proposition. During the Committee hearings, it became painfully clear that the cable industry was far different than services that have been regulated traditionally, such as water and electricity.

After all, the basic justification for regulation by Government is to protect the public from abuses that would otherwise occur if certain businesses with monopoly powers were allowed to operate without restraints. The classic examples are public utilities—gas, electricity, water—where individual consumers find the services absolutely necessary and have no reasonable alternative sources. As a result, the Government intervenes in order to guarantee universal service and to protect consumers from excessive rates. The two critical factors in each case are the lack of alternatives and the essential nature of the product or service.

Does cable have these critical factors? Absolutely not. I have no reluctance in saying that cable television is not an essential service in any sense similar to products such as gas and electricity. It may be fun, enjoyable, informative, or anything else, but it simply is not essential. No better proof is needed than to point out that over half the homes who have access to cable today do not subscribe.

Equally important, there are numerous alternatives for consumers. Why is this important? Because the basic justification for Government regulation is to protect consumers from excessively high prices. If there are numerous alternatives, then consumers will simply spend their money elsewhere until cable prices come down to the level they find desirable.

When I talk about alternatives, I am referring to the fact that cable television, as an entertainment and information medium, is competing with numerous other entities for the dollars and time of consumers. As such, consumers have the alternatives of newspapers, magazines, over-the-air broadcasting, radio, videotapes and discs, MDS services, scrambled television services, within a short time direct broadcast satellite programing, and even movie theaters, bowling alleys, libraries, and restaurants. All of these various activities—and many others like them—are direct competitiors of cable. Yet the only one subject to comprehensive economic regulation is cable television.

The simple fact is that cable television cannot overcharge the public for any length of time or provide inferior service because consumers will not subscribe if they do. There is no better consumer protection.

But the problem is not simply that Government regulation is not needed, it is actually contrary to the public interest. With all respect to representatives of State and local governments, the interests of city

and county governments are not always synonymous with the best interests of the individual public.

Many cities look upon cable television as a potential revenue bonanza. Let's face it, however, whatever tax benefits are realized by the cities will come largely and directly from the pocketbooks of its citizens and not the profits of the cable operators. A recent study showed that as much as 22 percent of the costs of a cable system can be attributed directly to Government regulation. A cost of only half this amount is a mighty high price to pay for Government regulation.

For my colleagues who share the cities' view of this legislation, I have one other thought. The complaints raised about the scheme set forth in this legislation are not so much about the bill itself, but the whole notion of regulation. Anytime that Congress tries to define roles for Government and private enterprise that interfere with the free market system, someone's interests will be compromised.

Those who are concerned that this legislation ties the hands of the local communities and gives the advantage to cable operators should very seriously consider supporting the concept of deregulation. It has the distinct virtues of simplicity and equality of treatment. If you consider the bill as going too far in protecting cable from both Government regulation and marketplace competition, at least half of your concern can be alleviated by supporting deregulation of cable television.

Finally, let me point out, as many others will also, that neither the Committee report nor the bill itself is particularly clear on the intent of this legislation. During the mark-up of the bill in Committee, an extensive dialogue between the members and Committee counsel indicated that individual communities and cable operators could avoid what seem, at first glance, to be statutory requirements. For example, consider the following exchange between the Committee Chairman and the Committee counsel:

> The CHAIRMAN. Let me ask this question of our counsel. Chris, there is nothing in this bill, nothing that prevents any kind of a bilateral arrangement, contract, being arrived at between a city and a franchisee with any terms in it?
>
> Mr. COURSEN. That is true.
>
> The CHAIRMAN. If at the time of the original bidding the city says, one of the conditions of the franchise we want written in is that at the end of the franchise there will be comparative challenges if we choose, and the franchiser agrees to that, that is legal?
>
> Mr. COURSEN. Yes, sir.[1]

Since the apparent limitations on local authority contained in this bill are optional rather than real and binding, the text of the legislation needs to be revised to express this intent.

When this legislation is considered by the full Senate, I will be prepared to elaborate on the need for deregulation of the cable industry.

HOWARD W. CANNON.

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[1] Transcript of the executive session of the Committee on Commerce, Science, and Transportation, July 22, 1982, p. 16.

ADDITIONAL VIEWS OF MR. HOLLINGS

Here we are faced with the telecommunications industry, one of the most rapidly growing industries in the American economy. Here we are faced with one sector of that industry—cable—that is still immature, that is thought to be able to truly compete with the enormous, incumbent communications interests. Here we are faced with a service that is surely not essential to the public. And what does the Committee do? Regulate it!

Such action comes as no surprise to me. When it comes to services and industries that are genuinely necessary to all of the American public, this Committee—against my sage advice—chooses to deregulate. So why not regulate when it comes to nonessential services, like cable, with many close substitutes? In refusing to vote for deregulation of cable telecommunications, this Committee has followed its own backward thinking to its logical conclusion. All that will come of it is that a developing service will be severely inhibited and that a public desiring and needing numerous choices will have to wait or go elsewhere.

State and local officials put forth two major arguments in support of continued State and local control over the provision of services by cable: essentiality and the crossing of public rights of way. However, it is clear that there is a plethora of substitutes for the services offered by cable and just because cable crosses public rights of way does not necessarily guarantee localities unfettered control over cable.

On its face, it is quite ironic that we are even thinking of regulating a service that was supposed to provide competition to the powerful and deeply entrenched broadcast and telephone interests. Upon delving deeper into the issue, one has to find Government control even more peculiar. Over the past decade, the Federal Government has sanctioned numerous new entrants into the delivery of programing and information. Most certainly, more are on the way as existing firms and aggressive entrepreneurs seek to advance current technologies.

How can cable possibly be an essential bottleneck? When it comes to basic services, the public can generally turn to the over-the-air commercial and noncommercial broadcasters. Some States and over 250 localities, in fact, have recognized that competition exists here and have deregulated basic cable rates. But even if these rates were not regulated, cable operators would make them low in order to attract the public to the more lucrative pay services.

When it comes to pay services, the cable operator, knowing this is where he makes his profit, will provide what the public wants. If for some reason he does not, there are those—such as the STV, MDS, DBS, SMATV, and video-cassette providers—that will. As for pay rates, the localities do not regulate these rates now and have not sought to in the future.

Finally, no one can doubt that cable faces tremendous competition in the provision of telecommunications services in the form of the regulated, omnipresent telephone companies. We have consistently sought to advance competition in these services, and we should not only welcome but encourage cable's entry. In addition, there are many other firms that are now or will soon be providing telecommunications services either by microwave facilities or satellite.

Given all this present and future competition, it is very difficult to see how cable can be considered an essential bottleneck. It simply does not possess the required attributes.

No one can doubt that localities should be able to exert some control over cable because it crosses public rights of way. However, this public rights of way rationale has limits; it must bow to larger national concerns.

Once communications could be generally defined by geographical lines: they were either intrastate or interstate. Modern technology, however, makes such distinctions absurd. With the advent of satellite delivery, interconnected networks, and other advances, communications bears almost no relation to arbitrary political boundaries. While some may quibble about this point, there can be no doubt that all telecommunications services must now be considered part of a national system.

Recent actions by Congress and the Federal Communications Commission reinforce this point. In all common carrier legislation, the Congress has preempted States in numerous regulatory areas. The FCC now oversees such locally delivered services as cellular radio and digital termination systems. Finally, even in regard to cable, the Commission as far back as 1972 took a leading role by adopting sweeping cable rules.

Although it cannot operate without crossing city streets, cable is clearly part of our national telecommunications system. None of its competitors are regulated locally; some are not regulated at all. Many of its services come to it as part of nationwide networks. If we are to structure a sound telecommunications system to serve the public, we must ensure that firms compete on as level a plain as possible.

Local control over cable must thus be consistent with national telecommunications policy—a policy that relies on competition and deregulation as the best way to provide service to the public. The localities should continue to have responsibility for public health, safety, and welfare concerns, including the enforcement of labor and antitrust laws, and they should have the ability to collect a fee for the use of public rights of way similar to the fee they charge others. However, economic control, other than to ensure the start-up of a cable system, must be abrogated to coincide with national interests.

In determining whether or not to regulate cable, one must not only look at the rationale for regulation; one must also examine the drawbacks of regulation.

Local oversight over cable certainly produces many. First, the current system of franchising cable is very expensive. In certain areas, the total cost of the cable bidding process can run upwards of $5 million. Second, the current system is often causing the creation of excess transmission capacity. Cable subscribers are thus paying something

for nothing or at best for a hope of some service much farther down the road. Third, this system is creating a host of subsidies—often involving tens of millions of dollars—where subscribers are picking up the costs of less attractive city and cable services. Such a tax not only inhibits people from becoming subscribers; it also may not be progressive.

In sum, the overall process of local oversight does not come cheaply. A recent study on the cost of cable regulation found that it accounts for about one-quarter of the cost of a cable system. Even if it is only one-half of this amount, this is a very high price for the public to pay for Government regulation, especially when the marketplace would force cable operators to provide as a whole the services the public wants. Further, this high price will obviously cause cable to be much less competitive, giving other service providers—who are not overseen by local governments—a distinct and unwarranted advantage.

The case for deregulation of cable is not that difficult to make. The current scheme of Government oversight of the cable industry is hardly justified and is very costly to consumers. But the Committee refuses to accept these facts. Just as we are moving in the direction of competition in the provision of telecommunications services, the Committee turns away. Just as we are developing a consistent national telecommunications policy, the Committee moves away. Just as we are confronting the limits of Government regulation and reducing Government's role, the Committee goes the other way.

At the most fundamental level, we are here to serve the public—not industry, not Government. That is our objective. In communications, we have consistently found that as a whole marketplace competition is the best means of ensuring the public has the services it needs and wants. Here the Committee backtracks, and as a result, the public loses.

As a final point, let me add that the cable industry came to Congress arguing they were overburdened by Government regulation at all levels. They are leaving the Commerce Committee without much respite and arguably with greater Government oversight. Must carry rules remain. Long distance signal carriage and syndicated exclusivity and any other rule the FCC may impose under other titles of the 1934 Communications Act remain possible. The Committee has added access channel requirements that are mandatory. The Committee has added a provision that favors basic rate regulation. Finally, the Committee has made it abundantly clear in discussion at the mark-up session that any requirements that this legislation imposes can be circumvented "voluntarily" in the franchise process. In other words, local officials can continue to extract whatever they want from cable operators if they make the effort and are ingenious. Such effort and such ingenuity will come only at further cost.

In the end, the Commerce Committee, in the name of promoting the development of cable telecommunications, has further injected Government into the process and has increased costs for the consumer. We have certainly come a long way. Unfortunately, the public and the cable industry will bear the expense of this trip.

I voted for this bill with great reluctance in the hope that I can work with the bill's authors to produce genuine competition and deregulation. I strongly believe it is in that direction that we must go.

ERNEST F. HOLLINGS.

ADDITIONAL VIEWS OF MR. GORTON

I am unable to support S. 2172 in its present form for two reasons. First, the bill goes too far in preempting the legitimate and traditional participation of States and local governments in the process of regulating cable television services. Second, the bill protects cable companies from vigorous and worthwhile competition. I, therefore, voted against reporting S. 2172.

I have supported the past efforts of this Committee to free a number of industries from unnecessary and anti-competitive regulation—that is, the intercity bus industry and the telephone industry. This bill, however, is not in any sense deregulatory. Rather, it merely substitutes Federal regulation for State and local regulation.

It is significant to note that a number of States have chosen to deregulate the provision of cable services in their jurisdictions. The decision to deregulate this industry, it seems to me, is best left to the States and to local governments who, because of their previous involvement in this subject, are better able to make that decision than the Federal Government.

A large number of States and municipalities, however, currently regulate through the franchising process the provision of cable television services within their respective jurisdictions. The process of negotiation leading to a contract between the franchising authority and the successful cable company has had no adverse impact on the rapid growth in the size and number of cable systems, or on the revenues of those systems. The record before us does not demonstrate any need to limit—as this bill does—the powers of these governments over cable television services with a corresponding shift in authority to the Federal Government.

Despite the assurances of Chairman Packwood at the mark-up that "there is nothing in this bill, nothing that prevents any kind of bilateral arrangement, contract, being arrived at between a city and a franchisee with any terms in it," I believe the bill will limit sharply the ability of the parties to the franchise to negotiate freely in such areas as the cost and content of basic cable service, and dedicated channel access requirements.

In addition, there is no reason to believe that the bill will result in consumers getting better service at less cost than they receive under the current regulatory framework. On the contrary, the bill reduces, and in some instances eliminates, meaningful competition among cable companies. I fail to see how consumers will benefit from any lessening of competition.

The elimination of meaningful competition is particularly evident with respect to the automatic franchise renewal requirement imposed by section 609. This section, in essence, provides that a successful cable franchisee is entitled to have its franchise renewed if it "has substan-

tially complied with the material terms of such franchise." This right of renewal is limited only by the illusory right of a franchisor to grant a competitor the right to wire over the top of the existing franchisee—a situation that exists in very few of the franchises in this country. Because the section applies to existing franchises, Congress is effectively forcing communities to continue to deal with the existing cable operator—a result they did not intend and could not have anticipated at the time they entered into their current fixed-term franchise contract. The provision also increases the likelihood for needless and expensive additional litigation for communities who want to terminate their relationship with the franchisee at the end of the contract. The losers under this provision will be municipalities with existing franchises, the competitors of past and future franchisees, and ultimately, the consumers of cable services.

The need for the Federal Government to insure the renewal of franchises is dubious. To begin with, the bill's sponsor—Senator Goldwater—stated during markup that there is an absence of any evidence that municipalities have abused their authority over the refranchising process. Second, if a right of renewal is important to a cable company, there is nothing that prevents it from negotiating to have such a provision included in the franchise agreement. Finally, the only party who will benefit from providing certainty of renewal is the franchisee.

Under current cable franchising practices, a franchisee can negotiate an extension of the franchise, and it is probable that such an extension would be conditioned upon a corresponding promise by the franchisee to meet fully the commitments of the existing franchise, and may be conditioned upon an additional commitment to improve or upgrade the system. Insuring certainty of renewal without insuring any corresponding promise—as this provision does—leaves the decision to improve or upgrade the system to the sole discretion of the franchisee. It thereby lessens, rather than increases, the likelihood that an existing franchisee will improve or upgrade the system to the benefit of the community and consumers.

In reality, the renewal provision bails cable companies out of marginally profitable franchise agreements—those where the return on investment does not begin until late in the franchise term—even though the company agreed to the terms and length of the franchise at arms-length, with open eyes, and often with superior knowledge over the small- and medium-sized municipality. As a result, the Federal Government would insure the profitability of franchises to cable companies, while denying to consumers the benefits of a truly competitive refranchising process.

SLADE GORTON.

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